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In the Supreme Court of the United States

OCTOBER TERM, 1998

TEXAS ASSOCIATION OF DAIRYMEN, DAIRY PRODUCERS OF NEW MEXICO, LONE STAR MILK PRODUCERS, L.C. AND PREMIER MILK PRODUCERS, INC.,
Petitioners,

v.

MINNESOTA MILK PRODUCERS ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a motion to intervene for purposes of appeal is timely if filed in time to perfect such an appeal?

2. Whether a dairy farmer has standing to challenge provisions of a federal milk marketing order when the producer has no interest in the producer settlement fund of that particular federal milk marketing order?

PARTIES TO THE PROCEEDINGS WITH RULE 29.6 STATEMENT

The would be intervenors and Appellants below, and Petitioners here, include Texas Association of Dairymen, a Texas membership not-for-profit corporation comprised of dairy producers, Dairy Producers of New Mexico, a New Mexico membership not-for-profit corporation comprised of dairy producers, Lone Star Milk Producers, L.C., a Texas Limited Liability Company organized as a Capper-Volstead association of dairy producers, and Premier Milk Producers, Inc., a Texas agricultural cooperative organized as a Capper-Volstead association of dairy producers. There are no parent or subsidiary companies.

The Plaintiffs below and Respondents here are the Minnesota Milk Producers Association and several individual dairy producers.

The Defendant below, Dan Glickman, Secretary of the United States Department of Agriculture, may also be a Respondent in this case.

The Association of Dairy Cooperatives in the Northeast, National Farmers Organization, Inc., Milk Industry Foundation, Southeast Dairy Farmers Association and United Dairymen of Arizona also sought to intervene below as well as various state applicants for intervention, including Louisiana Department of Agriculture and Forestry, the Georgia Department of Agriculture, the South Carolina Department of Agriculture, the North Carolina Department of Agriculture, the Vermont Department of Agriculture, Food, and Markets, the Alabama Department of Agriculture and Industries, the Arkansas Livestock and Poultry Commission, the Washington Department of Agriculture, the

Colorado Department of Agriculture, the Maine Department of Agriculture, Food and Rural Resources, the Massachusetts Department of Food and Agriculture, the Mississippi Department of Agriculture and commerce, the New Hampshire Department of Agriculture, Markets, and Food, the New Mexico Department of Agriculture, and the North Carolina Department of Agriculture.

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In the Supreme Court of the United States

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TEXAS ASSOCIATION OF DAIRYMEN, DAIRY PRODUCERS OF NEW MEXICO, LONE STAR MILK PRODUCERS, L.C. AND PREMIER MILK PRODUCERS, INC.,
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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Texas Association of Dairymen, Dairy Producers of New Mexico, Lone Star Milk Producers, L.C., and Premier Milk Producers, Inc., ("Southwest Producers") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINION BELOW

The judgment of the United States Court of Appeals for the Eighth Circuit was dated August 13, 1998, and the decision is reported at *Minnesota Milk Producers Ass'n, et al. v. Glickman,* 153 F.3d 632 (8th Cir. 1998). The decision is reproduced in the Appendix at A-1. That decision reversed in part and remanded in part the decisions of Hon. David S. Doty in *Minnesota Milk Producers Ass'n v. Glickman,* dated November 3, 1997 (App. at A- 42), and December 5, 1997 (App. at A-27). It also reaffirmed a 1992 decision of the Eighth Circuit Court of Appeals in *Minnesota Milk Producers Ass'n v. Madigan*, 956 F.2d 816 (8th Cir. 1992) (*J. Stuart dissenting*) (App. at A-52).

Southwest Producers petitioned the court for rehearing or in the alternative for a hearing en banc. That request was denied on November 20, 1998, and that decision is also noted at *Minnesota Milk Producers Ass'n v. Glickman*, 153 F.3d 632 (8th Cir. 1998). (*JJ. Fagg, Wollman and Beam dissenting*). (App. at A-61).

JURISDICTION

The judgment sought to be reviewed in this case is dated August 13, 1998, rehearing and suggestion for hearing en banc denied November 20, 1998. The statutory basis for the issuance of this writ is 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 24:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Agricultural Marketing Agreement Act, 7 U.S.C. §608c

The text of the Agricultural Marketing Agreement Act, as amended, is reproduced in the Appendix at A-62.

7 C.F.R. §1126.70-72

The text of this statute is reproduced in the Appendix at A-85.

7 C.F.R. §1138.70-72

The text of this statute is reproduced in the Appendix at A-88.

STATEMENT OF THE CASE

1. In response to milk marketing failure, Congress enacted legislation for the economic regulation of milk marketing. Agricultural Marketing Agreement Act of 1935, 7 U.S.C. §601 *et seq.* (AMAA). The purpose of the federal milk

marketing orders is to create orderly marketing by discouraging producers from fighting for markets to their universal curse.

Pursuant to the AMAA, the Secretary of Agriculture is given the authority to formulate and administer federal milk marketing regulations in various regions throughout the United States. Each of these regions is referred to as a marketing area and the regulations concerning the marketing of milk in the area are commonly referred to as orders. There are presently thirty-two (32) milk marketing orders being administered by the Secretary throughout the United States. Each of these orders has its own agency and rule making history. A producer comes under the benefits of an order when he chooses to market milk to a plant regulated under the order.

Consistent with the purposes of the AMAA, the Secretary from time to time proposes amendments to these orders. Producers who will benefit from these orders must approve the amended orders in a referendum called for that purpose. The resulting regulations, or orders, are described individually at 7 C.F.R. Parts 1001 through 1139 and these marketing areas encompass virtually all major metropolitan areas in the United States - the notable exceptions being those in California, Hawaii and Alaska. In 1997, producers pooled over 105 billion pounds of milk in federal orders with producer settlement funds in excess of 13.8 billion dollars. Dairy Market Statistics, 1997 Annual Survey. USDA AMS.

Among the orders affected by this case are the Texas Milk Marketing Order, 7 C.F.R. Part 1126, and the New Mexico-West Texas Milk Marketing Order, 7 C.F.R. Part 1138. Since May of 1975, producers shipping in the Texas Milk Marketing Area have received minimum prices based, in part, on Class I differentials. This marketing order is a merger of six smaller orders in

metropolitan areas of Texas and some subsequent additions of territory to the marketing area when the Red River Valley Federal Order was terminated. 47 Fed. Reg. 54421 (December 3, 1982).

In December 1989, the Secretary in accordance with 7 C.F.R. Part 900 and 7 U.S.C. §608c held a hearing in El Paso, Texas for the purposes of creating the New Mexico-West Texas Milk Marketing Order and modifying the Class I prices in the Texas Marketing Order. The New Mexico-West Texas Milk Marketing Order was issued in 1991 and represents a consolidation of three smaller orders in the Texas Panhandle, New Mexico and El Paso. 56 Fed. Reg. 52447 (Oct. 21, 1991).

Pursuant to the law, producers, including members of the Petitioners, voted in favor of the two orders. The Minnesota Producers did not participate in that hearing or the vote, nor did they challenge its results.

By rules promulgated under the AMAA, and unchallenged by the Minnesota Producers, only the members of Southwest Producers and others similarly situated, and not any of the Minnesota Producers, had and have an interest in the Class I proceeds paid by handlers to the producer settlement funds in the Texas and New Mexico - West Texas orders. See 7 C.F.R. §1126.70-72 (App. at A-85) and 7 C.F.R. §1138.70-72 (App. at A-88).

Reform of these federal milk orders is ongoing. Under the Agricultural Market Transition Act of 1996, 7 U.S.C. §7253, the Secretary is obligated to pursue major reform of the federal milk marketing orders including changes to the Class I differentials. Final reform must be completed by April 4, 1999. 7 U.S.C. §7253. Congress has directed the Secretary to issue a proposal in the period from February 4, 1999 to April 4, 1999

with it being effective in October 1999 (to be codified at 7 C.F.R. Parts 1000 *et seq*). The reform has been contentious and litigation is expected. The issues presented by Petitioners will likely be revisited as a result of the October 1999 decision.

2. In 1990, a group of dairy producers in Minnesota ("Minnesota Producers") commenced litigation in the United States District Court for the District of Minnesota, against the Secretary of the United States Department of Agriculture, challenging several of these federal milk marketing orders, including the Texas and New Mexico-West Texas orders, in which the Minnesota Producers had no interest in the producer settlement fund. Minnesota Producers sought a declaration that the prices paid by the handlers for Class I milk, or fluid milk, in these orders violated the AMAA, alleging that the producer settlement funds resulting from those prices yielded too high a price to other producers, including the Petitioners.

The district court, per Hon. J. Murphy, dismissed the case on the grounds that Minnesota Producers had no standing. The Court of Appeals reversed. *Minnesota Milk Producers Ass'n v. Madigan*, 956 F.2d 816 (8th Cir. 1992) (*J. Stuart dissenting*) (App. at A-52). On remand, the district court held, *inter alia*, that the Secretary's decision not to amend the Class I prices in the extant orders as proposed in a national hearing was arbitrary and capricious and therefore remanded the matter to the Secretary to file an amended decision within 120 days. The Secretary prepared an Amplified Decision which was filed on August 12, 1994. 59 Fed. Reg. 42422 (August 10, 1994).

In response to the Minnesota Producers' second motion for summary judgment, (March 17, 1995), Hon. David S. Doty again remanded the matter to the Secretary to issue a Second Amplified Decision. Order, May 17, 1996. The Secretary

thereafter submitted a Second Amplified Decision. 59 Fed. Reg 49081 (September 18, 1996).

On November 3, 1997, the district court granted Minnesota Producers' fourth summary judgment motion and enjoined the Secretary from enforcing the Class I differentials in a number of federal milk marketing orders, including the Texas and New Mexico-West Texas orders. (App. at A-42). The injunction was stayed pending an expedited appeal. (App. at A-27).

3. The Petitioners represent producers who participate in the producer settlement funds under both the Texas and the New Mexico-West Texas Milk Marketing Orders which are funded, in part, by the Class I differentials subject to the challenge by Minnesota Producers.

The Texas Association of Dairymen is a not for profit organization comprised of dairy producers who participate in the Texas producer settlement fund. Dairy Producers of New Mexico is a New Mexico not for profit organization whose members participate in the blend generated by the New Mexico-West Texas Milk Marketing Agreement. Lone Star Milk Producers, L.C. is an association of producers whose members participate in the Texas producer settlement fund under the Texas Milk Marketing Order, and Premier Milk Producers, Inc. is a dairy marketing cooperative in Texas and its members, too, participate in the Texas producer settlement fund.

Southwest Producers, facing immediate, severe and irreparable financial loss in the producer settlement funds of their orders as a result of the injunction, moved to intervene in the litigation for purposes of appeal on December 3, 1997. The deadline for noticing an appeal in that case was January 2, 1998.

On December 5, 1997, the district court denied the Southwest Producers' motion for intervention finding it "untimely". (App. at A-27). Its discussion on the timeliness of intervention focused on the date the litigation commenced, not on the date of judgment that triggered appeal deadlines.

On December 17, 1997, the Southwest Producers timely appealed the decision denying intervention, as well as the Order of November 3, 1997. The appeal of the Petitioners was consolidated with appeals of the parties as well as other would be intervenors similarly denied intervention.

Although the court of appeals (JJ. R. Arnold, McMillian, and Loken) reversed the district court on the merits, it, nonetheless, affirmed the district court's finding that the Southwest Producers' motion for intervention was "untimely", citing its earlier decision in *Arrow v. Gambler's Supply, Inc.*, 55 F. 3d 407, 409 (8th Cir. 1995). *Minnesota Milk Producers Ass'n, et al. v. Glickman*, 153 F.3d 632 (8th Cir.1998). Southwest Producers identified this Court's decision in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), *rehearing denied*, 434 U.S. 989, as standing for the proposition that moving to intervene in time to appeal was timely. The court of appeals did not consider that holding.

Southwest Producers thereafter, on September 28, 1998, filed a petition for rehearing with suggestion for hearing en banc. That petition was denied on November 20, 1998. *Minnesota Milk Producers Ass'n v. Glickman*, 153 F.3d 632 (8th Cir. 1998) (*JJ. Fagg, Wollman and Beam dissenting)* (App. at A-61).

REASONS FOR GRANTING THE WRIT

I. Certiorari is necessary to resolve a conflict among the circuits on the issue of whether a motion to intervene for purposes of appeal is timely if filed in time to perfect such an appeal.

This case involves a recurring question of great significance: Whether a post-judgment motion to intervene for purposes of appeal is timely if filed in time to perfect such an appeal? This Court has answered that question in the affirmative as have some courts of appeals. The Eighth Circuit's answer to the question, that such intervention is untimely, departs from holdings in this Court and creates an irreconcilable conflict among the circuits.

Fed. R. Civ. P. 24 allows intervention as a matter of right upon a showing that the movant's application is (1) timely; (2) that the applicants are so situated that the Court's disposition will, as a practical matter, impair and impede their ability to protect their interest; and (3) that their interest is not adequately represented by existing parties. Southwest Producers ask this court to grant certiorari on the issue of timeliness of a post judgment motion to intervene for purposes of appeal. Certiorari should be granted for the following reasons.

This Court has established the test for timeliness of post-judgment intervention and the Eighth Circuit decision ignores that test. In deciding *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), *rehearing denied* 434 U.S. 989, this Court opined that its decision on timeliness "is consistent with several decisions of the federal courts permitting post-judgment intervention for purposes of appeal", noting that "The critical inquiry in every such case is whether in view of all the

circumstances the intervenor acted promptly after the entry of final judgment." *Id.* at 395. This Court cited those earlier federal court decisions which consisted of both cases of a representative nature, such as the class action situation presented in *United Airlines Inc. v. McDonald,* and cases of a nonrepresentative nature. *Id.* at fn 16.

In *United Airlines, Inc. v. McDonald*, the movant filed her motion to intervene "18 days after the District Court's final judgment, and thus was well within the 30-day period for an appeal to be taken." *Id.* at 390. This Court held that in determining whether to permit post-judgment intervention for purposes of appeal an application made within the time to file a notice of appeal is timely, when it stated, "In so far as the motions to intervene in these cases were made *within the applicable time for filing an appeal*, they are consistent with our opinions and judgment in the present case." *Id.* at fn 16 [emphasis added].

This case also creates an irreconcilable conflict among the circuits. "A principal purpose for which [the Supreme Court] use[s] certiorari jurisdiction . . . is to resolve conflicts among the United States Courts of Appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. U.S.*, 500 U.S. 344, 347 (1991). *See also, N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270, 273 (1973) ("We granted the petition for certiorari, there apparently being a conflict between this decision in the Sixth Circuit and a decision in the Eighth Circuit, and also with one in the Ninth Circuit." *citations omitted*).

A conflict among the circuits exists as a result of the Eighth Circuit's decision herein. In *Hodgson v. United Mine Workers of America*, 473 F.2d 118 (D.C. Cir. 1972), the District of Columbia Court of Appeals held that a motion to intervene by

mine workers after judgment creating a trusteeship had been entered was timely. This Court expressly adopted the *Hodgson* holding in *United Airlines, Inc. v. McDonald*, 432 U.S. 380, 396, fn 16.

In addition to conflicting with the *Hodgson* decision, the court of appeals decision in this case conflicts with decisions in other circuits, including the Ninth Circuit and the Sixth Circuit. In the Ninth Circuit, in *Yniguez v. Arizona*, 939 F.2d 727, 734-35 (9th Cir. 1991) the court of appeals affirmed the district court's application of the "general rule that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal". Similarly, in the Sixth Circuit, in *Linton v. Commissioner of Health and Environment*, 973 F.2d 1311, 1318 (6th Cir. 1992), the Sixth Circuit held that "The [district] court incorrectly placed undue emphasis on the fact that the movants did not file their applications to intervene until July 30, 1990, approximately two and one-half years after the suit was initiated. Since the post-judgment motions to intervene were filed 25 days after the district court entered its final judgment, their applications were made within the 30-day time period prescribed for purposes of filing a notice of appeal." The decisions in the Ninth Circuit and Sixth Circuit irreconcilably conflict with the decision of the Eighth Circuit in this matter.

This Court has also considered timeliness under another rule by focusing on the stage of the proceeding. *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380 (1993) (the stage of the proceeding is relevant in determining whether late filing was excusable neglect). The emphasis was whether the timing was such that granting the motion would disrupt the proceedings. In this way the decision below conflicts with *Pioneer*.

This issue is recurring and continued conflict will result. The issue of the timeliness of post judgment intervention can arise in almost any litigation challenging agency action or inaction, as well as class action litigation. If the conflict in the circuits is not resolved, there will be different rules for different circuits enabling parties to use such as a criteria for "forum shopping". This Court, in promulgating the Civil Rules, has stated that its purpose is uniformity in application throughout the Nation. Allowing the conflict to continue will interfere with that uniformity.

II. The decision of the Eighth Circuit Court of Appeals that a dairy farmer has standing to challenge even though he has no interest in the producer settlement fund of that particular federal milk marketing order contradicts holdings of this Court.

As courts of limited jurisdiction, the federal courts invoke the doctrine of standing to carve out for review only those "justiciable" cases in accordance with the "case" or "controversy" requirement of Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). Standing is a threshold issue in all cases. *National Org. of Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) (addressing the "threshold question" of standing. "Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.")

The central element in each of the federal milk marketing orders is the producer settlement fund. The orders determine who pays in, how much they pay, and who receives what in return. The producer settlement fund takes payments from handlers based on one pricing scheme, blends the receipts, and pays producers based on a different pricing scheme. The courts have considered standing to challenge the Secretary under the

AMAA in terms of three general categories- (1) handlers; (2) producers; and (3) all others. This Court noted that Congress clearly intended to limit the classes of those who can bring claims under the AMAA:

> The remainder of the statutory scheme, however, makes equally clear Congress' intention to limit the classes entitled to participate in the development in the market orders. The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them. Handlers and producers - but not consumers - are entitled to participate in the adoption and retention of market orders. 7 U.S.C. §§ 608c (8),(9),(16)(B). The Act provides for agreements among the Secretary, producers, and handlers, 7 U.S.C. § 608c(2), for hearings among them, §§ 608(5), 608c(3), and for votes by producers and handlers, §§ 608c(8)(A), (9)(B), (12), 608c(19). Nowhere in the Act, however, is there an express provision for participation by consumers in any proceeding. In a complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process.

Block v. Community Nutrition Institute, 467 U.S. 340, 346-47 (1984). This case asks this Court to determine if the term "producers" only includes producers subject to a particular order, or any producer.

Handlers only have standing to challenge the Secretary in a judicial forum following the exhaustion of their administrative remedies. 7 U.S.C. 608c(15)(A) and (B). *United States v. Ruzicka*, 329 U.S. 287 (1946). In *Ruzicka*, this Court considered a challenge in which the handler had refused to make payments as ordered because it argued they were illegal. This Court, in determining whether the handler had to exhaust administrative remedies before proceeding, found that the legislative intent was that handlers must pay now and argue their positions later. ("The reliance of the industry upon that Fund makes *prompt payments into it imperative*." *Id.* at 289 [emphasis added]).

This Court noted the delicate balance of the federal milk order program when it stated that

> The success of the operation of such Congressionally authorized milk control must depend on the efficiency of its administration . . . Thus, definite monthly deadlines are fixed by the Order for every step in the program. In large measure, the success of this scheme revolves around a 'producers' fund which is solvent and to which all contribute in accordance with a formula equitably determined and of uniform applicability. Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements. To make the vitality of the whole arrangement depend on the contingencies and inevitable delays of litigation, no matter how alertly pursued, is not a result to be attributed to Congress unless support for it is much more manifest than we

> here find. That Congress avoided such hazards for its policy is persuasively indicated by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance. It thereby safeguarded individual as well as collective interests.

In *Ruzicka,* this Court was attentive to the delicate balance of the federal milk order system and recognized that judicial decisions on standing could impact the effectiveness of the federal order program.

Similarly, in addressing standing of producers, this Court has held that only producers who have a pecuniary interest in the producer settlement funds under the challenged orders have standing. Moreover, Congress never intended that producers not subject to a particular federal order would have standing to destroy that federal milk order through judicial intervention. In *Stark v. Wickard,* 321 U.S. 288 (1944), this Court held that producers who had a legal right to the producer settlement fund had an injury which constituted a "definite personal right" which was not held by any other person, and as a result, had standing to bring the action. *Id.* at 309.

In other words, the producers must have a particularized injury, one that distinguishes them from the masses. In *Stark*, the producers could claim a definite, direct injury - a loss of funds in that the challenged deduction reduced amounts they actually received for their milk. *Id.* at 302. These facts, important to this Court, take the *Stark* producers beyond the realm of the generic term "producers" and put them in that much narrower category of producers who are entitled to participate in the affairs of the milk order, and by such, have standing.

Standing as predicated on this pecuniary interest was recognized again in the Sixth Circuit in *Farmers Union Milk Mktg. Coop. v. Yeutter*, 930 F. 2d 466 (6th Cir. 1991). In *Farmers Union*, dairy cooperatives petitioned the Secretary to adopt regulations which would benefit them at the expense of Farmers Union's dairy farmers. A hearing was noticed and Farmers Union opposed the proposal at every opportunity. The proposal was thereafter approved by the Secretary and a vote of the affected producers. The resulting change directly affected the producer settlement fund, which Farmers Union had a proprietary interest in, by directly reducing the amount they were entitled to receive. Again, those facts took the *Farmers Union* producers beyond the realm of the generic term "producers" and they therefore had standing.

The Ninth Circuit, however, has taken a completely different position in *Pescosolido v. Block*, 765 F.2d 827 (9th Cir.1985). In *Pescosolido*, orange growers challenged the legality of a federal marketing order. The Ninth Circuit affirmed the district court's holding that the producers lacked standing to challenge the order, interpreting *Community Nutrition* "to foreclose judicial review sought by anyone other than handlers." *Id.* at 831.

The rationale behind courts only having jurisdiction when there is a "case" or "controversy" is amply illustrated by this case. Dairy farmers with no legal interest, nor any financial interest, in the federal orders they challenged succeeded in obtaining an injunction which could have devastated the industry. To allow dairy farmers with no such interest in the producer settlement funds of the challenged orders, and not directly participating in the market, to have the ability to interfere through judicial intervention to pursue a political agenda could delay, or even, as in this case, remove from producers under the order the very

benefit of an orderly market that Congress intended the affected producers to enjoy. As this Court stated in *Ruzicka*, "the interest of the entire industry need not be disturbed to do justice to an individual case." *Ruzicka*, 329 U.S. at 293-94.

If Congress had intended dairy farmers who had no vote to either terminate an order or approve it, to have the authority to challenge it in court, it would have said so. To give dairy farmers power in court they otherwise do not possess in the law is inconsistent with the scheme of judicial preclusion apparent in the AMAA. This is because under the AMAA the Secretary is to find a fair price for the milk and enforce its payment by handlers. His announcement of a price in an order without objection from those intimately involved in the transaction (handlers and producers subject to that order) is itself evidence that his decision is correct and effectuates the purposes of the AMAA. Congress recognized this when it limited those who could participate in approving the orders to just those classes.

It is necessary to foreclose that argument now, before the courts are again called upon to consider political alternatives promoted by those who do not have a stake in the producer settlement funds at issue.

CONCLUSION

This case presents the opportunity for this Court to protect the federal milk order program from suits brought by disinterested persons, and to maintain the orderly marketing of milk that Congress envisioned in the federal milk order program. A decision by this Court would resolve conflict in the lower courts, and provide concise law for the litigation which will likely follow conclusion of the federal order reform in October 1999.

A conflict exists between the circuits on the issue of timeliness of a motion to intervene for purposes of appeal. The only way uniformity can be obtained is by this Court granting certiorari and announcing a uniform interpretation.

The decision by the Eighth Circuit Court of Appeals also conflicts with the Sixth Circuit and the Ninth Circuit which conflict with each other. The Eighth Circuit and Ninth Circuit conflict with decisions of this Court on the issue of standing to challenge federal milk orders. This is an important industry and program deserving clear law.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and Order of the United States Court of Appeals for the Eighth Circuit on both issues.

Dated: February 12, 1999

Respectfully submitted,

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APPENDIX

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November 3, 1997 District Court Order A-42

Minnesota Milk Producers Ass'n v. Madigan (1992) A-52

November 20, 1998 Order Denying Rehearing A-61

Agricultural Marketing Agreement Act, 7 U.S.C. §608c . A-62

7 C.F.R. §1126.70-72 . . . . . A-85

7 C.F.R. §1138.70-72 . . . . . A-88

MINNESOTA MILK PRODUCERS ASSOCIATION, a non-profit Minnesota corporation, individually, on behalf of themselves and others similarly situated;

v.

Dan GLICKMAN, Secretary, United States Department of Agriculture, Appellant/Cross-Appellee.

Nos. 97-4145MN, 97-4241MN, 97-4220MN, 97-4224MN, 97-4226MN, 97-4331MN, 97-4334MN, 97-4361MN and 97-4362MN.

United States Court of Appeals, Eighth Circuit.

Submitted Feb. 8, 1998.

Decided Aug. 13, 1998.

Milk producers brought suit challenging various aspects of federal milk pricing program. The United States District Court for the District of Minnesota dismissed, and appeal was taken. The Court of Appeals, 956 F.2d 816, reversed and remanded. On remand, the District Court, 851 F.Supp. 1389, concluded that Secretary of Agriculture's final decision to retain existing Class I milk pricing structure was arbitrary and capricious, and it remanded for further consideration. After Secretary issued amplified decisions, the District Court, David S. Doty, J., 981 F.Supp. 1224, granted producers' motion for summary judgment in part. Secretary appealed. The Court of Appeals, Richard S. Arnold, Chief Judge, held that: (1) Secretary's decision to maintain existing system of Class I differentials in milk pricing structure was within his discretion and was not arbitrary or capricious; (2) Secretary was not arbitrary and capricious in decision to maintain "M-W base price," as component of Class I milk pricing system, with minor modification; (3) district court was within its discretion in denying motions for intervention filed by other producer organizations and state agricultural agencies; and (4) state agencies were not indispensable parties, so as to warrant relief from judgment

for failure to join them as parties.

Affirmed in part and reversed in part.

Loken, Circuit Judge, filed concurring opinion.

*636 Jeffrey A. Clair, Washington, DC, argued (Frank W. Hunger, David L. Lillehaug, Stephen W. Preston, and Barbara C. Biddle, on the brief), for Dan Glickman.

Marvin Beshore, Harrisburg, PA, argued, for National Farmers Organization and Ass'n of Dairy Cooperatives.

Benjamin F. Yale, Waynesville, OH, argued (Kristine H. Reed, on the brief), for Premier Milk Producers, Lone Star Milk Producers, Dairy Producers of New Mexico and Texas Ass'n of Dairymen.

David McFadden, New Orleans, LA, argued (C. James Gelpi and Dan Zimmerman, on the brief), for Louisiana Dept. of Agriculture, et al.

Lynn Ann Hayes, St. Paul, MN, argued (Karen R. Krub, on the brief), for Minnesota Milk Producers Ass'n.

Before RICHARD S. ARNOLD, (FN1) Chief Judge, McMILLIAN and LOKEN, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

The Minnesota Milk Producers Association (MMPA) challenges the Secretary of Agriculture's system for pricing "Class I" milk under the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. ss 601 et seq. (1994). The District Court held that one aspect of the pricing system--the "differential"--was unlawful and the Secretary's decision to maintain its operation unsubstantiated, and therefore enjoined the Secretary from enforcing this price component in most of the country's milk-marketing areas. The Court upheld the other

component of the Class I price--the "base price." Subsequently, the Court denied the post-judgment motions of other producer organizations and numerous state agencies for intervention, as well as for relief from judgment. On the Secretary's motion, it stayed the injunction pending appeal. We extended the stay until this decision.

The Secretary of Agriculture appeals the Court's holding that the differential component of the Class I milk price is unlawful, and that the Secretary's decision to maintain it was arbitrary and capricious. On cross-appeal, the MMPA challenges the Court's upholding of the base-price component of the Class I milk price. The various movants appeal the Court's denial of their post-judgment motions.

We hold that the Secretary's decision to maintain the current system for pricing Class I milk was within his discretion, and therefore reverse the portions of the District Court's order that hold otherwise. We affirm *637 the denial of intervention, and other post-judgment relief, to the various movants.

I. BACKGROUND

A. General

A brief examination of the milk industry and the development of milk price regulation is helpful to understand the issues on appeal. As the Supreme Court has explained, "two distinctive and essential phenomena of the milk industry" create the potential for market disequilibrium. Zuber v. Allen, 396 U.S. 168, 172, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). The first is that the price of raw milk depends on its end use. The second is that production yield varies seasonally, resulting in oversupply in summer months. Absent regulation or coordination, therefore, the milk market is vulnerable to destabilizing competition among producers to sell for the highest-price use, on the one hand, and inequitable bargaining power favoring buyers, on the other.

Ultimately, these market characteristics led to the establishment, as

part of the AMAA, (FN2) of federal milk regulation through marketing orders. The statute was intended "to raise producer prices" and "to ensure that the benefits and burdens of the milk market are fairly and proportionately shared by all dairy farmers." Block v. Community Nutrition Inst., 467 U.S. 340, 342, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984) (citation omitted).

First, as to raising producer prices, the statute requires the Secretary to classify milk according to its end use, and to provide a method for fixing minimum prices for each classification in each marketing area. The minimum prices are to be uniform as to all handlers, subject only to certain adjustments for: "(1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers." 7 U.S.C. s 608c(5)(A).

Accordingly, the Department of Agriculture uses three end-use classifications for milk products: Class I denotes fluid milk, Class II soft manufactured products, and Class III hard, storable manufactured products. The minimum-price calculation for each classification begins with a base price--known as the Minnesota-Wisconsin (M-W) price (FN3)--representing the competitive value of milk used for manufacturing purposes. Specifically, the base price is the average price paid to milk producers for Class III milk in Minnesota and Wisconsin by plants producing manufactured products. Class III milk is then priced at the base price; Class II milk at the base price plus a differential that is uniform in all areas; and Class I milk at the base price plus an area-specific differential that is intended to stimulate nonlocal producers to supply that area sufficiently.

Second, regarding the equitable distribution of sale proceeds, the statute requires the Secretary to ensure that all milk producers supplying a particular marketing area be paid a uniform price, "irrespective of the uses made of such milk by the individual handler to whom it is delivered," subject to certain adjustments. 7 U.S.C. s 608c(5)(B)(ii). (FN4)

The current system operates as a settlement fund based on a uniform "blend price." The blend price is calculated as the weighted average of the minimum prices of the three classes of milk. All handlers in a marketing area pay the blend price to producers supplying that area, regardless of the classification *638 of the milk they are buying. For Class I milk, whose minimum price is higher than the blend price, the handler pays the difference into the settlement fund. For Class II and III milk, whose minimum prices are lower than the blend price, the handler withdraws the difference from the fund. In this way, all producers supplying a marketing area receive the same price, yet all handlers pay at least the minimum price specifically applicable to the milk's end use.

B. Class I Differentials

The subject of this dispute is the pricing of Class I milk. The current computation--base price plus an area-specific Class I differential--has been used since the 1960s. Until then, during the first 25 years of the milk-marketing-order program, "[t]he independence of markets ... made it easier to deal with local changes in supply and demand." Agricultural Marketing Service, U.S. Department of Agriculture, Marketing Bulletin No. 27, The Federal Milk Marketing Order Program 34. In the 1960s, however, "[a]dvances in transportation and refrigeration facilitated the movement of milk between markets and, thus, markets began to lose many of their local characteristics. The ability of handlers to obtain their supply of milk from sources outside the traditional milkshed made it necessary to give more weight to the cost of alternative milk supplies in establishing the Class I price level for
a market. The increased mobility of milk made national supply-demand conditions an important factor in the supply-demand conditions of local markets.... Class I prices [came to be] viewed as a coordinated system of prices for the various markets...." Id. Therefore, "[c]hanges in individual order prices usually are made only in the context of a system of prices for all markets." Id.

The last such changes before 1985 occurred in 1968. Thereafter, no

significant changes were made, in part because markets "remained adequately supplied at existing Class I price levels. When supplies have tightened, cooperatives have obtained over-order[-minimum] payments to help cover the cost of importing needed supplies." Id. at 35.

However, in 1985, Congress found that the then-existing Class I differentials were not high enough to accomplish their goal of adequate supply by nonlocal producers:

The last major changes made by the Department of Agriculture to Class I price differentials were in the late 1960s. Since costs, including transportation, assembly, and handling, have increased substantially during that time, the Committee feels it is necessary to adjust the fluid milk differentials in 35 of the 44 federal milk orders so that the prevailing minimum order prices will better cover the cost of supplying these markets. This action will reduce the need for over-order payments and providing [sic] equity among handlers supplying the market. H.R.Rep. No. 99-271(I), at 22, reprinted in 1985 U.S.C.C.A.N. 1103, 1126.

Congress therefore amended the AMAA to address specifically the pricing of "milk of the highest use classification," in s 608c(5)(A). That provision fixes "the minimum aggregate amount of the adjustments, under clauses (1) and (2) [customary and quality adjustments]" at levels ranging from $1.20 (for the Upper Midwest) to $4.18 (for Southeastern Florida) per hundredweight, representing increases for 35 of the 44 orders. These minimum differentials were to be effective "[t]hroughout the 2-year period beginning on [December 23, 1985] (and subsequent to such 2-year period unless modified by amendment to the order involved)." The differentials have not since been amended, by either Congress or the Secretary.

II. HISTORY OF THE CASE

In 1990, the MMPA sought a declaration that the Secretary's pricing of Class I milk violated the AMAA, and an injunction ordering him to

hold hearings on amendments. (FN5) It claimed that the Class I differentials depend solely on a marketing area's distance *639 from the Upper Midwest--specifically, Eau Claire, Wisconsin. It further claimed that s 608c(18) of the AMAA requires the differentials to reflect economic factors specific to each marketing area. Therefore, it alleged, the differentials violate s 608c(18). Moreover, the complaint alleged that in each marketing area this differential system resulted in a windfall to producers who are located closer than the Upper Midwest producers, but who nevertheless receive differential reflecting the full cost of transport from the Upper Midwest. The MMPA claimed that the excess production thereby stimulated is channeled into Class II and III products, and thus drives down the blend price, thereby lowering the M-W base price as well, and causing harm to the Upper Midwest producers. The MMPA alleged that the Secretary's system thus created disorderly marketing conditions, in further violation of the AMAA.

The District Court initially dismissed the action, holding that the Secretary's decision to enforce the differential pricing system was unreviewable, and that the MMPA did not have standing. We reversed. Minnesota Milk Producers Ass'n v. Madigan, 956 F.2d 816 (8th Cir.1992). In the meantime, the Secretary had begun rulemaking hearings on the milk-pricing system. On remand, the
District Court stayed proceedings until the completion of the proceedings.

In 1993, the Secretary concluded that no changes to the Class I differentials were warranted, and rejected the numerous proposals for change that had been presented during the hearings, including that of the Upper Midwest Federal Order Coalition (UMFOC), of which the MMPA is a member. Milk in the New England and Other Marketing Areas; Decision on Proposed Amendments to Tentative Marketing Agreements and Orders, 58 Fed.Reg. 12634 (1993) [Secretary's Decision I]. Part of this decision undertook an order-by-order review in which the Secretary classified each area as deficit, balanced, or surplus, and concluded that, under the current system, most were balanced. The MMPA then moved for summary judgment, asking the

Court to declare the existing differential system unlawful and to order the Secretary to change it.

The District Court found that it was unable to determine whether the Secretary's decision to retain the statute's differentials was supported by substantial evidence because "explicit findings and explanations were not issued relative to the 608c(18) factors." District Court Order at 19 (April 14, 1994). It remanded the decision to the Secretary, with instructions to issue an amplified decision "setting forth findings of fact and explanations for his conclusions regarding proposed amendments to the Class I pricing provisions of the federal milk marketing order." Id. at 23.

The Secretary issued an amplified decision on August 17, 1994. Milk in the New England and Other Marketing Areas; Amplified Decision, 59 Fed.Reg. 42422 (1994) [Secretary's Decision II]. The decision explained that the market-specific factors of s 608c(18) were automatically accounted for in the other component of the Class I price, the M-W base price, and that the Class I differential addressed the further variable of transportation cost.

The Secretary's explanation was again found inadequate. The District Court found that the pricing system was based on a single point of origin, and that "the Secretary may not enforce what is clearly a single basing-point system without explaining how it reflects full and reasoned consideration of the statutory factors." District Court Order at 7 (May 16, 1996). It remanded the decision a second time, ordering another amplified decision, which would reflect "specific and reasoned consideration of the [s 608c(18)] factors" in the Secretary's decision regarding both the Class I differential and the base price. Id. at 13.

The Secretary issued a second amplified decision on September 18, 1996. Milk in the New England and Other Marketing Areas; Second Amplified Decision, 61 Fed.Reg. 49081 (1996) [Secretary's Decision III]. He refuted the characterization of the Class I differential system as being based from a single point of origin and explained why the

M-W price was a good measure of supply and demand.

*640 The MMPA again moved for summary judgment. The District Court declared that the Class I differentials in "all surplus and balanced marketing orders and all deficit orders that do not rely on direct shipments of alternative milk supplies from the Upper Midwest or from other deficit orders which in turn rely on the Upper Midwest for replacement supplies" were unlawful because the Secretary had failed to consider the s 608c(18) factors. District Court Order at 14 (Nov. 3, 1997). It enjoined the Secretary from enforcing the differentials, and held the Secretary's initial and two amplified decisions to be arbitrary and capricious. However, it upheld the Secretary's finding that the M-W base price satisfied the s 608c(18) criteria.

III. JUSTICIABILITY

[1] We address first the Secretary's argument that the MMPA had neither a cause of action nor standing to bring this action. See Steel Co. v. Citizens for a Better Env't, --- U.S. ----, ----, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 210 (1998) (rejecting the doctrine of "hypothetical jurisdiction," which allows a court to "proceed immediately to the merits question ... at least where ... the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied"). We rejected these
positions in our prior decision. Those holdings are now the law of the case, and because they were not "clearly erroneous" and would not "work a manifest injustice," we decline to disturb them. Liberty Mutual Ins. Co. v. Elgin Warehouse and Equip., 4 F.3d 567, 570-71 (8th Cir.1993).

IV. THE CLASS I DIFFERENTIAL

A. Standard of Review

[2] Our review of the Secretary's decision to maintain the existing system of Class I differentials is governed by Chevron v. Natural

Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Under the Chevron standard, the first inquiry is "whether Congress has directly spoken to the precise question at issue," in which case we "must give effect to the unambiguously expressed intent of Congress." Id. at 842-43, 104 S.Ct. 2778. If the statute does not provide specific guidance, we then consider "whether the agency's answer is based on a permissible construction of the statute." Id. at 843, 104 S.Ct. 2778.

1. The Statutory Responsibilities of the Secretary Regarding Amendment

[3] We hold that the AMAA has not spoken directly to the specific issue of when and how the Secretary should seek to amend the Class I differentials prescribed by Congress in s 608c(5). Section 608c(5)(A) provides that its differentials will remain unchanged "unless modified by amendment to the order involved." However, it does not require the Secretary to propose or adopt any such amendment within any particular time. Moreover, the plain language of the statute weighs against the MMPA's assertion that "[t]he 1985 Act only relieved the Secretary of the duty of monitoring the Class I prices for compliance with the s 608c(18) pricing mandates for the two years in which the Act explicitly prohibited modification," Appellees' Br. (in Nos. 97-4145, 97-4241) at 32, even accepting its contention that the 1985 amendments were implemented "within an Act designed to permanently reduce surplus production of milk." Appellees' Br. (in Nos. 97-4220, 97-4224, 97-4226, 97-4331, 97-4334, 97-4361, 97-4362) at 22.

The crux of the MMPA's argument lies in s 608c(18) of the statute, but this reliance is misplaced. Section 608c(18) lays down requirements that the Secretary must meet before changing or amending marketing agreements or orders: "prior to prescribing any term in any marketing agreement or order, or amendment thereto, ... or prior to modifying the price fixed in any such term." In that case--that is, when the Secretary wishes to amend an order--he must then: ascertain the parity prices of [the milk]. The prices which it is

declared to be the policy of Congress to establish in section 602 of this title [setting forth goals of statute] shall ... be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to *641 which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds ... that the parity prices of such commodities are not reasonable in view of [these economic conditions], he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(Emphases added.) In this case, the Secretary has not found that the prices set by Congress are unreasonable, nor that changed circumstances make adjustments necessary. The statute leaves that decision to his discretion.

The MMPA also contends that other sections of the statute--specifically s 608c(3), s 608c(16)(A), and s 608c(17)--"place a burden on the Secretary to continuously monitor the orders and their impact to ensure that they effectuate the stated purposes of the AMAA and comply with its substantive provisions." Appellees' Br. (in Nos. 97-4145, 97-4241) at 6-7. We find the contention overstated. Section 608c(3) requires the Secretary to give notice of and opportunity for hearing on a proposed order "[w]henever [he] has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter." (Emphasis added.) Section 608c(16)(A)(i) provides that "the Secretary of Agriculture shall, whenever he finds that any order issued under this section ... obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation
of such order...." (Emphasis added.) These provisions, like s 608c(18), are implicated only after the Secretary has decided that

changes to the marketing orders are warranted, a situation this case does not present. Similarly, s 608c(17) requires only that the Secretary hold a hearing under specific conditions--"if one-third or more of the producers as defined in a milk order apply in writing for a hearing on a proposed amendment of such order ... [and] if the proposed amendment is one that may legally be made to such order"--that do not amount to an ongoing general duty of monitoring and adjustment. Ultimately, the only provision specific to milk price regulation that addresses the Secretary's duty to amend is s 608c(1): "The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders...." We cannot hold this statement to be a specific directive.

Nor does a specific duty of adjustment arise from the general precatory statements of policy in ss 602(1) and (4), which require the Secretary to "establish and maintain ... orderly marketing conditions" effectuating the statute's goals of parity prices and orderly flow of market supply. These provisions are generally applicable to all the agricultural commodities covered by the AMAA, and cannot override the statutory scheme specifically devised for the regulation of milk, which has left the initiation of amendment to the Secretary's discretion.

We therefore hold that Congress has placed no specific conditions on the Secretary's power to maintain the status quo. Specifically, to apply s 608c(18) to the Secretary's decision not to pursue amendment--that is, to hold that the Secretary may not decline to change the differentials unless he finds that the differentials prescribed in the statute are still valid under current economic conditions--would reverse the statute's intended procedure for amendment. The burden, that is, is on those who advocate change to show that it is required; it is not on the Secretary to show that no change is necessary.

2. Deferential Review

[4] The Secretary's decision not to amend is therefore "given controlling weight unless [it is] arbitrary, capricious, or manifestly

contrary to the statute." Chevron v. Natural Resources Defense Council, Inc., 467 U.S. at 844, 104 S.Ct. 2778. See also 5 U.S.C. s 706 (1994). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow *642 one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

In this case, several considerations add to the already "considerable weight [that] should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." Chevron, 467 U.S. at 844, 104 S.Ct. 2778 (footnote omitted). First, the Supreme Court itself has noted the intricacy of "the labyrinth of the federal milk marketing regulation provisions." Zuber v. Allen, 396 U.S. at 172, 90 S.Ct. 314.
"A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority." Blair v. Freeman, 370 F.2d 229, 232 (D.C.Cir.1966).

Second, Congress, not the Secretary, established the existing differentials, and we must presume them lawful and effective to reach the statute's goals. That the dairy provisions of the Agricultural Market Transition Act of 1996, 7 U.S.C.A. s 7253 (West Supp.1998), do not reject the differential system outright indicates that Congress continues to deem it an acceptable, if not necessarily the preferred, system. The 1996 statute requires the Secretary to amend and consolidate the milk marketing orders and specifically identifies as relevant issues "(A) [t]he use of utilization rates and multiple basing points for the pricing of fluid milk [and] (B) [t]he use of uniform multiple component pricing when developing 1 or more basic formula prices for manufacturing milk." 7 U.S.C.A. s 7253(a)(3). Though it prohibits the Secretary from considering, or basing any decision on, the Class I differentials currently set by s 608c(5)(A), 7 U.S.C.A. s

7253(a)(4), the new statute does not preclude him from reinstituting transportation-based differentials more generally. We therefore believe that the current system should continue to be given especial deference as the product of legislative judgment.

Third, the burden in this case is upon the MMPA to show that a change was required, and not upon the Secretary to defend his decision to retain the status quo. We have held that the Secretary bears the burden of presenting substantial evidence when he seeks amendment of a milk order. Walmsley v. Block, 719 F.2d 1414 (8th Cir.1983). When another party, here the MMPA, is the proponent of amendment, it should bear the same burden. See also 5 U.S.C. s 556(d) (in formal rulemaking, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof"). The inquiry therefore is not whether the Secretary established that the differentials should remain unchanged, but whether the MMPA established that they should not. The deference due the Secretary's decision is the greater for the MMPA's failure to follow through, before the District Court and on this appeal, with its initial proposal for change, leaving it in the weak position of attacking the present system without presenting an alternative.

[5] Finally, case law suggests that agency inaction is presumptively unreviewable. "An agency's decision not to take enforcement action should be presumed immune from judicial review...." Heckler v. Chaney, 470 U.S. 821, 832, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). "The general exception to reviewability provided by [5 U.S.C.] s 701(a)(2) for action 'committed to agency discretion' remains a narrow one, but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise." Id. at 838, 105 S.Ct. 1649. Though the untaken action in this case is amendment, and not enforcement, the principle remains that a decision to do nothing is entitled to more deference than a decision to act.

B. The Lawfulness of the Secretary's Decision

[6] We believe that the Secretary's decision to maintain the existing Class I differentials was not arbitrary and capricious. The record indicates that the Secretary *643 based his decision on numerous factors relevant to the statute's goals of "insur[ing] a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest," 7 U.S.C. s 608c(18), and further that his decision was not a "clear error of judgment." See Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 416, 91 S.Ct. 814 (in deciding whether agency action was arbitrary and capricious, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment").

The Secretary's 1990 rulemaking hearings, which were held at various locations throughout the country and lasted 43 days in all, encompassed careful consideration of the Class I differential system. Thirty-five proposals for amendment were considered, portray[ing] a wide range of views regarding how Federal orders should be changed or not changed. Altogether, nearly 200 persons, including dairy farmers, cooperative association representatives, members of other general farm organizations,
proprietary handlers, state officials, members of the United States Congress, and others, testified at the hearing. Thus, the record contains the views and testimony of a broad cross-section of the dairy industry and other interested parties. Secretary's Decision I at 12645.

The Secretary considered the proposals of the Midwest producers, as well as opposing testimony from other hearing participants. He noted that Midwestern producers held markedly different views from the country's other producers:

In general, the testimony reflects one of two basic views. The first is one of basic support for the order program as is. This point of view was expressed by virtually all parties from areas of the country other than the Midwest.... The second point of view reflected in the

testimony of most parties from the Midwest also expressed strong support for the Federal order program, but was critical of the system of Class I prices that now operates in all the orders. Secretary's Decision I at 12645. The relative unpopularity of the Midwest's views was relevant, in light of the statute's requirement that no amending order be effective without the approval of at least two-thirds of the producers who supply the marketing area, or of producers who produce at least two-thirds of the milk in the marketing area. 7 U.S.C. s 608c(8), (9).

The hearings included analysis of "the supplies and utilization of producer milk ... order by order and region by region." Id. at 12646. This analysis showed that:

"(1) The [12] orders in the Southeast ... have very high levels of Class I use ... [,] low levels of Class II ... and very low Class III utilizations. Some of these markets are deficit markets, that is, they do not produce enough milk to supply the Class I needs, including reserves on a year-round basis. (2) [Seven] Midwest and Far West and Northwest markets ... have far more milk available than is needed for Class I and Class II use, plus reserves.... (3) The remaining [21] markets exhibit essentially a balance between supply and demand...." Id. at 12647. These findings were relevant to whether the statute was achieving its goal of ensuring an adequate supply in each marketing area. The meaning of these findings is contested by the parties. In particular, MMPA contends that there is an inherent contradiction in using differentials to encourage the movement of milk into balanced or surplus marketing orders. However, the Secretary articulated "a rational connection between the facts found and the choice made," Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (citation omitted): that the Class I differentials were at least partially responsible for keeping those markets out of deficit. We therefore defer to the Secretary's interpretation of the marketing data.

The Secretary's decision also addressed more technical aspects of the Class I differential system, including those now raised by *644

the MMPA on appeal. For example--in response to exceptions filed by the UMFOC, representing the MMPA--it discussed the measurement of reserve, supply, and demand, as well as the marketing efficiency of the Class I pricing system. Id. at 12647-49. This discussion showed consideration of further relevant factors. We believe that it was not then "clear error" for the Secretary to conclude:

[T]he present Class I differential should remain in place. The underlying basis for the level of Class I prices under the order program is the statutory pricing standard which requires that prices reflect the supply and demand for milk. Within this context, the present Class I differentials appear to be set at a reasonably satisfactory level. Although there might be a basis for some downward adjustments in certain markets, such as in the heavy production areas of the Midwest, it is difficult to determine from this record what the adjustments should be. This is particularly so when the industry has strongly supported over the years a coordinated set of differentials based on fairly constant rates of change from market to market. Id. at 12646.

We recognize that the current Class I differential system is imperfect. Its heavy-handed reliance on a marketing area's distance from the Upper Midwest probably justifies characterizing it as a single-basing-point system, as the District Court, the MMPA, and several hearing witnesses did. Even so, it is not so rough an approximation that, under our deferential standard of review, we could find that the Secretary was compelled to undertake amendment. However, as the Secretary himself states, "[t]his is not to say that the Secretary lacks a continuing duty to investigate and respond to changed circumstances that warrant modification of the existing orders." Appellant's Br. at 37 (footnote omitted) (emphasis added). We hold only that the Secretary's conclusion in this case, that circumstances had not changed to that critical extent, was not arbitrary and capricious.

C. The Sufficiency of the Secretary's Explanations

[7] We also believe that the Secretary sufficiently explained his

decision to maintain the existing differential system. Because he did not bear the burden of proof, and because of the resulting deferential standard of review due his inaction, the Secretary's burden of explanation was not heavy.

In his first decision, the Secretary summarized the 35 proposals for changing the Class I pricing system, and the supporting testimony for each. Secretary's Decision I at 12637--12645. He then analyzed the major concerns reflected by those proposals. Id. at 12645 -12652. We agree with the Secretary that "[t]he basic issue is whether a compelling case was made that some other Class I pricing system is needed. After a review of the supply and demand situation in the various markets, it is concluded that no changes are needed. Having concluded that the current Class I pricing system is appropriate and is in accord with the pricing standard in the Act, it is not necessary to then proceed to discuss in detail why each of numerous proposals should not be adopted," id. at 12649, the MMPA's (through the UMFOC) included.

Moreover, at the Court's request, the Secretary provided further explanation of the Class I price, in his amplified decisions of 1994 and 1996. In response to the Court's first remand order, the Secretary explained that the other component of the Class I price, the M-W base price, accounted for many of the local market factors listed in s 608c(18): because it reflects the competitive market price for raw milk, it "automatically reflects the price and availability of supplies of feed and all other economic factors that affect the supply and demand for milk and dairy products." Secretary's Decision II at 42425. He then explained that the Class I differential "is intended to partially reflect the cost of transporting milk ... [and] serves as an incentive to move milk from supply areas to demand centers." Ibid. He acknowledged that "[b]ecause some milk is produced just about everywhere, the mix of milk produced near consumption centers with milk shipped from distant areas varies *645 among orders," id. at 42426--a fact on which the MMPA's argument is built--but explained that "[a]s the mobility of milk increased, a transition necessarily occurred from considering only isolated local markets to considering

a system of regional markets that are linked through class price coordination. Individual markets that previously set class prices based on local supply-demand
conditions now are part of larger regional markets whose prices are coordinated through the M-W price...." Ibid.

The 1996 amplified decision addressed the further concerns of the Court as to both the differential and base-price components of the Class I price. The Secretary contended with some plausibility that the present differentials are not a single-basing-point system: the mere fact that real-world market forces necessarily yielded, over time, an aligned Class I pricing system that correlates to geography simply does not mean that the enormous reserve quantities of milk in the Upper Midwest relative to other marketing areas (east of the Rocky Mountains) constitute a "single basing point." The high degree of correlation between distance from the Upper Midwest, and another area's supply-demand relationship is reflective of this reality. It justifies the current Class I differentials, not the other way around. Id. at 49085. Regarding the Court's question of how the M-W price accounted for local market conditions, the amplified decision explained that the M-W price served the statute's goals by "incorporating the fluctuations in supply and demand, as reflected by free market transactions, into classified pricing. Class I pricing therefore responds to, rather than dictates, supply and demand." Ibid.

V. THE M-W BASE PRICE

[8] We have before us the further issue of whether the District Court erred in upholding the M-W base price, which was not the subject of the MMPA's suit. We hold that it did not. The issue of the M-W base price entered the litigation through the Secretary's explanation in his first amplified opinion. In that opinion, responding to the Court's question of how the Class I differential reflected local economic factors, the Secretary answered that those factors were accounted for largely by the M-W base price, not the differential, and proceeded to explain the concept and development of that price. In its second remand order, the Court asked specifically for more explanation of the

base price, which the Secretary provided in his second amplified opinion. In that opinion, he also indicated that, though the base price had not been addressed at the 1990 rulemaking, there had been a subsequent hearing, in 1992, which had focused on the base price, and he summarized the findings from that hearing. In its final opinion, the Court found that "the Secretary's reference to the second administrative hearing, as discussed in the second amplified decision, deals with the s 608c(18) factors and the M-W price. Accordingly, the Court finds that the Secretary has fulfilled his burden with respect to this aspect of the Class I price of milk." District Court Order at 12 (Nov. 3, 1997).

Because the concerns about the M-W price were integrally related to--indeed, grew out of--the MMPA's challenge of the differential, the question of its validity was properly before the Court. It is the total Class I price--the two price components together--and not just the differential, that must satisfy the statute. The Secretary explained, [T]he M-W price is the key component in the Class I price, representing the many supply and demand factors referenced in s 608c(18). The M-W price does not, however, reflect one factor uniquely relevant to Class I fluid milk pricing: the cost of transporting milk from alternative supply sources. When the Class I differential, which largely reflects transportation costs, is added to the M-W price, the minimum Class I price in each market is set. Secretary's Decision III at 49086. The question of the lawfulness of the differential could not be resolved without accounting for the effect of the base price.

The MMPA contends that because it had not focused on this aspect of the Class I price during the course of litigation, the Court's understanding of the issue was insufficient to *646 support a holding. However, further litigation would not add to the existing administrative record of the Secretary's 1992 hearing. On the basis of that record, we hold that the Secretary's maintenance of the M-W base price was not arbitrary and capricious. We note that, though the use of the M-W base price was not established by statute, the other factors weighing in favor of deferential review of the Class I differentials also

apply to a review of the base price.

The record supports the Secretary's decision to maintain the M-W base price with minor modification. The hearing encompassed ten proposals, addressing "(1) competitive pay prices, (2) product price formulas, (3) cost-of-production formulas, and (4) the price support level." Milk in the New England and Other Marketing Areas; Decision on Proposed Amendments to Tentative Marketing Agreements and Orders, Proposed Rule, 60 Fed.Reg. 7290-91 (1995). The full discussion of these proposals in the Secretary's decision indicates a consideration of relevant factors, after which the Secretary's finding that "the economic rationale stated when the M-W was first adopted remains sound today as it was when it was adopted order-by-order from 1961 until universally adopted in 1975," Secretary's Decision III at 49086, was not clear error. The Secretary's decision thus was not arbitrary and capricious.

VI. POST-JUDGMENT MOTIONS

[9] The following movants appeal the Court's denial of their post-judgment motions for intervention: the National Farmers Organization, the Association of Dairy Cooperatives in the Northeast, the Texas Association of Dairymen, Dairy Producers of New Mexico, Lone Star Milk Producers, Premier Milk Producers, and the agricultural agencies of various states. (FN6) The Court denied the motions for intervention because they were untimely. We agree.

[10] The determination of timeliness was committed to the discretion of the District Court. Arkansas Elec. Energy Consumers v. Middle South Energy, Inc., 772 F.2d 401, 403 (8th Cir.1985) (citation omitted). The Court considered the factors relevant to a determination of timeliness: "how far the litigation had progressed at the time of the motion for intervention, the prospective intervenor's prior knowledge of the pending action, the reason for the delay in seeking intervention, and the likelihood of prejudice to the parties in the action." Arrow v. Gambler's Supply, Inc., 55 F.3d 407, 409 (8th Cir.1995). It found the movants' proffered reasons--that they lacked notice of the action and

did not realize its potential effects on their interests--"hard to believe" in light of the publication of the Secretary's amplified decisions and the organizations' presumably heightened awareness of and interest in dairy regulation issues. District Court Order at 15 (Dec. 5, 1997). It noted that the movants had not sought to intervene until the latest opportunity, and that their delayed entry would prejudice the MMPA, who would be forced to respond to the movants' arguments. We believe these findings to be within the Court's discretion.

[11] Additionally, the state movants appeal the Court's denial of their motion for relief from judgment under Federal Rule of Civil Procedure 60(b). They claim that Rule 60(b)(4)--providing relief when the judgment is void--allows for relief from judgment when indispensable parties who could have been joined were not. We affirm the Court's holding that the state movants were not indispensable parties to this action. Though *647 the determination of the legality of the Secretary's decision would and will affect all organizations whose interests are reached by the Secretary's regulations, "this fact does not make all of those effected [sic] individuals indispensable parties." NAACP v. Donovan, 558 F.Supp. 218, 223 (D.D.C.1982).

VII.

We reverse the judgment that the Class I differential system is unlawful and the Secretary's decision arbitrary and capricious. We therefore also reverse the injunction against its operation. We reject MMPA's challenge on cross-appeal to the District Court's holding that the M-W price is lawful. We also affirm the Court's rejection of the post-judgment motions brought by nonparties. The Secretary may therefore continue to enforce the existing Class I pricing system.

It is so ordered.

LOKEN, Circuit Judge, concurring.

I agree that the district court's injunction must be reversed, but I

arrive at this conclusion by a somewhat different path.

In November 1975, the President's Antitrust Immunities Task Force undertook to study the effects of government regulation of the dairy industry. The Task Force's 1977 final report urged reduced Class I differentials and phased deregulation of milk marketing, observing:

[F]ederal milk orders are a significant deviation from a free-market economy, which deviation creates substantial undesirable economic effects. The system as administered has succeeded to a startling extent in maintaining milk markets as they existed in the 1930s.... The goal of an adequate supply for local consumption needs has been achieved; however, the need frequently is inappropriately supplied from local production, to the substantial detriment of consumers and some producers.... The order system and cooperative monopolization have cost consumers and society millions of dollars each year in overcharges, deadweight losses, and transfer payments. Some farmers (grade B and Minnesota and Wisconsin grade A) actually lose income to other farmers (all other grade A). It is difficult to imagine that Congress intended this result. U.S. DEPARTMENT OF JUSTICE, FEDERAL MILK MARKETING ORDERS AND PRICE SUPPORTS 139-41 (Paul W. MacAvoy ed.1977). Congress nonetheless went in the other direction in 1985, mandating higher Class I differentials for at least two years. By March 1990, industry concerns had prompted the Secretary to announce "a national hearing on milk marketing orders to 'determine whether reasons
exist to change current Federal milk orders,' " with particular emphasis on the Class I differentials. Milk in the New England and Other Marketing Areas [etc.], 58 Fed.Reg. 12634, 12635 (1993).

This appeal concerns the final agency action in that proceeding. There is substantial evidence that the existing Class I differentials do not reflect current supply/demand conditions in the various local milk marketing areas. (FN7) Faced with this evidence, the district court was understandably frustrated at the Secretary's continuing inability to justify differentials that he decided to retain at the end of a lengthy proceeding he had initiated. Nonetheless, I conclude the court's

decision to declare the Secretary's action arbitrary and capricious and to enjoin its implementation should be reversed because of overriding recent events.

In the Agricultural Market Transition Act of 1996, Congress acknowledged the need for reform and directed the Secretary to amend milk marketing orders, using an expedited informal rulemaking procedure and focusing specifically on the issue of "multiple basing *648. points for the pricing of fluid milk." 7 U.S.C. s 7253(a)(3)(A). Acting pursuant to this new authority, the Secretary promulgated proposed amendments to the marketing orders in January 1998, some two months after the district court issued its injunction. Using a computer simulator designed at Cornell University, the Secretary advanced two options to replace the current Class I differentials, both intended to better correlate regulated milk prices and existing market conditions. See Proposed Amendments to Marketing Agreements and Orders, 63 Fed.Reg. 4802, 4904-15 (1998) (to be codified at 7 C.F.R. pts. 1000 et seq.). The second option, which the Secretary describes as "preferred," will "move the dairy industry into a more market-determined pricing system" and "reduce[ ] the government presence in establishing minimum Class I prices" by setting prices according to a mathematical estimate of transportation costs and by giving "dairy farmers and processors more freedom to negotiate fluid milk
price levels." Id. at 4913-15. In other words, the Secretary now has in progress, with the express endorsement of Congress, a new administrative proceeding explicitly addressing the deficiencies the district court has identified in existing milk marketing orders. The Secretary is required to complete this proceeding and to implement amended marketing orders by April 4, 1999. See 7 U.S.C. s 7253(b)(2)(B).

Milk marketing orders are the product of complex legislation and are administered by an agency of the executive branch chosen by Congress and subject to congressional oversight and control. As the court has explained, the judiciary has a meaningful but limited role in reviewing whether the agency has acted consistently with its

legislative mandate. Regulatory reform is a difficult, time consuming task best conducted by Congress and the Executive, the branches of government directly responsible to the electorate. In the midst of a long, politically sensitive debate over how to reform an antiquated regulatory regime, Congress has now intervened in decisive fashion, and the Secretary has begun implementing this new mandate. It is time for the judiciary to stay its hand. Accordingly, while I have substantial sympathy for the Minnesota Milk Producers Association's position and the
district court's response to the issues it was presented, I concur.

FN1. The Hon. Richard S. Arnold stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on April 17, 1998. He has been succeeded by the Hon. Pasco M. Bowman II.

FN2. The Agricultural Market Transition Act of 1996 includes provisions reforming the scheme of milk price regulation. 7 U.S.C.A. s 7253 (West Supp.1998). Accordingly, the Secretary has proposed new rules, 63 Fed.Reg. 4802-01 (1998), and solicited comments. However, because he has not yet effected any changes to the present system, we proceed with our consideration of this appeal under the AMAA.

FN3. After the decision of the Secretary at issue here, a slightly modified version of the M-W price began to be used as the base price. The parties agree that the modifications are not relevant to our consideration of the base price herein.

FN4. In the alternative, the Secretary may provide "for the payment to all producers ... delivering milk to the same handler of uniform prices for all milk delivered by them," subject to producer approval. 7 U.S.C. s 608c(5)(B)(i).

FN5. It also brought claims related to other aspects of the Secretary's milk orders, claims which are not now before us.

FN6. These agencies are: Alabama Department of Agriculture and Industries; Arkansas Department of Agriculture and Livestock/Livestock and Poultry Commission; Colorado Department of Agriculture; Georgia Department of Agriculture; Kentucky Department of Agriculture; Louisiana Department of Agriculture; Maine Department of Agriculture, Food, and Rural Resources; Massachusetts Department of Food and Agriculture; Mississippi Department of Agriculture and Commerce; New Hampshire Department of Agriculture, Markets, and Food; New Mexico Department of Agriculture; North Carolina Department of Agriculture; South Carolina Department of Agriculture; Vermont Department of Agriculture, Food, and Markets; and Washington Department of Agriculture. Rhode Island Department of Environmental Management and West Virginia Department of Agriculture are listed as movants on appeal, but were not part of the initial motion for intervention.

FN7. For example, a study using computer generated, revenue-neutral differentials based on 1995 data concluded that the differential in Minneapolis was $.77/cwt too low, while differentials for Dallas, Denver, and Phoenix were more than $.60/cwt too high. See PRATT ET AL., ESTIMATION OF REGIONAL DIFFERENCES IN CLASS I MILK VALUES ACROSS U.S. MILK MARKETS 5 (1998). A study based on 1993 data reached similar conclusions. See NOVAKOVIC, CORNELL PROGRAM ON DAIRY MARKETS AND POLICY BRIEFING PAPER NO. 22: TESTIMONY ON FEDERAL MILK MARKETING ORDER POLICY 5-6 (1995).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Minnesota Milk Producers Association, et al.,

Plaintiffs,

v.

Dan Glickman, Secretary, United States Department of Agriculture,

Defendant.

Civ. No. 4-90-31 (DSD/JMM)

ORDER

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This matter is before the court on the following motions: 1) defendant's motion to stay pending appeal; 2) the motions of the Association of Dairy Cooperatives in the Northeast, National Farmers

Organization, Inc., Milk Industry Foundation, Southeast Dairy Farmers Association and United Dairymen of Arizona, and the Texas Association of Dairymen, Dairy Producers of New Mexico, Lone Star Milk Producers, L.C., and Premier Milk Producers, Inc. to intervene and for a stay pending appeal; and 3) the motions of the Louisiana Department of Agriculture and Forestry, the Georgia Department of Agriculture, the South Carolina Department of Agriculture, the North Carolina Department of Agriculture, the Vermont Department of Agriculture, Food, and Markets, the Alabama Department of Agriculture and Industries, the Arkansas Livestock and Poultry Commission, the Washington Department of Agriculture, the Colorado Department of Agriculture, the Maine Department of Agriculture, Food and Rural Resources, the Massachusetts Department of Food and Agriculture, the Mississippi Department of Agriculture and commerce, the New Hampshire Department of Agriculture, Markets, and Food, the New Mexico Department of Agriculture, and the North Carolina Department of Agriculture[1] (hereafter "the state movants") to intervene, for a stay pending the hearing on this matter and appeal, and for relief from judgment. Based on a review of the file, record, and proceedings herein, the court stays its November 3, 1997, order until February 15, 1998, to allow an expedited appeal of that order and to allow the collection and distribution of November 1997, December 1997, and January 1998 milk proceeds based upon the Class I differentials in effect at those

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[1] The Colorado, Maine, Massachusetts, Mississippi, New Hampshire, New Mexico, and North Carolina movants seek leave to amend the previously filed motions, orders, notices, and memoranda of the other state movants so as to reflect the inclusion of these additional states. Pursuant to Fed. R. Civ. P. 15(a), this motion is granted. In addition, the state applicants seek leave to file supplemental affidavits. This motion will also be granted.

times,[2] denies all the motions to intervene, and denies the motion for relief from judgment.

BACKGROUND

On November 3, 1997, this court enjoined the Secretary of Agriculture from enforcing the Class I fluid milk differentials in all surplus and balanced marketing orders and all deficit orders that do not rely on direct shipments of alternative milk supplies from the Upper Midwest or from other deficit orders which in turn rely on the Upper Midwest for replacement supplies. The basis for the court's decision was the Secretary's failure to consider the factors mandated by the Agricultural Marketing Agreement Act, codified at 7 U.S.C. §608c(18), when setting the differentials.

Since that decision, a number of motions have been filed with the court. First, the defendant Secretary of Agriculture has filed a motion pursuant to Fed. R. Civ. P. 62(c) to stay the Court's November 3, 1997 order pending appeal to the United States Court of Appeals for the Eighth Circuit. Second, the Association of Dairy Cooperatives in the Northeast, the National Farmers Organization, Inc., the Milk Industry Foundation, the Southeast Dairy Farmers Association and United Dairymen of Arizona, and the Texas Association of Dairymen, Dairy Producers of New Mexico, Lone Star Milk Producers, L.C., and Premier Milk Producers, Inc. have moved both to intervene in this action pursuant to Fed. R. Civ. P. 24 and to stay enforcement of the order pending appeal.[3] Finally, the state movants have filed motions to intervene, to stay the order pending the hearing on this matter and the appeal, and for relief from judgment pursuant to Fed. R. Civ. P.

The court on November 7, 1997, ordered that the Secretary complete the collection and distribution of October 1997 milk proceeds based upon the Class I differentials in effect at that time.

The Milk Industry Foundation seeks only a 90 day stay.

60(b).

DISCUSSION

A. Motion for Stay Pending Appeal

Pursuant to Fed. R. Civ. P. 62(c), the court may "suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond[4] or otherwise as it considers proper for the security of the rights of the adverse party." The court considers four factors in determining whether to grant a stay of an injunction pending appeal: 1) whether the movant has made a strong showing that he is likely to succeed on the merits of the appeal; 2) whether the movant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure others; and 4) the public interest. Iowa Utilities Bd. V. F.C.C., 109 F.3d 418, 423 (8th Cir. 1996); In re Workers' Compensation Refund, 851 F. Supp. 1399, 1401 (D. Minn. 1994) (citing Hilton v. Braunskill, 481 U.S. 770 (1987)). The defendant Secretary of Agriculture moves the court for a stay of this court's November 3, 1997, order. The court will consider each of the factors in turn.

1. Success on the Merits

The first factor the court must consider is whether the moving party, in this case the Secretary of Agriculture, has made a strong showing that he is likely to succeed on the merits of the appeal. In considering this factor, the focus is not necessarily on whether the Secretary has shown a likelihood that his appeal will be successful, although this is relevant, but whether the order involves the determination of substantial and novel legal questions. Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County, Minn., 927 F. Supp. 348, 350 (D. Minn. 1996); In re Workers' Compensation Refund, 851

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4 Fed. R. Civ. P. 62(e) eliminates the need for a bond when a court's judgment is stayed pending an appeal by the government.

F. Supp. at 1401.

As the Secretary points out, the Class I differentials enjoined by the court have been in effect since 1985. Further, this court is the first to enjoin the use of Class I differentials since they first came into existence sixty years ago. Serious questions are raised concerning the Secretary's authority both under the current statutory scheme and under much-anticipated revisions to the milk pricing scheme forthcoming pursuant to the 1996 Farm Bill. The court can therefore conclude that its injunction against enforcement of the differentials presents a substantial and novel legal issue for the Secretary himself, the Department of Agriculture, and the milk industry.

2. Irreparable Harm

The second factor is whether the Secretary of Agriculture will be irreparably injured absent a stay. The Secretary is responsible for establishing and maintaining such orderly marketing conditions for milk as will ensure, in the interests of producers and consumers, an orderly flow of that commodity. 7 U.S.C. §602(4). Given this responsibility, the court will look not only to the harm the Secretary may incur absent a stay, but also the potential harm to producers and consumers.

As the court has cited numerous times, 7 U.S.C.§608c(18) provides that when the Secretary establishes a pricing system for milk, such prices

> shall . . . be adjusted to reflect the price of feeds, the available supply of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that parity prices of such

> commodities are not reasonable in view of the price of feeds, the available supply of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest.

While the Secretary's inability or unwillingness to adhere to the pricing factors contained in this mandate served as the basis of the court's injunction, at this state in the proceedings the latter part of this same statutory section serves as the source of the Secretary's harm. As is clear from the Secretary's arguments, the court's injunction against a large number of the Class I differentials abruptly takes away from the Secretary one tool he uses to assure a level of farm income adequate to maintain productive capacity. As the Secretary points out, the overnight elimination of the relevant Class I differentials could cause chaos in the effected marketing orders by taking away a component of milk pricing that has long been relief upon by the industry. While the court still considers the final, first amplified, and second amplified decisions regarding Class I differentials to be arbitrary and capricious, at the same time the court is neither qualified nor willing to assume the role of the Secretary in administering the milk pricing system.

While the Secretary of Agriculture is the named defendant here, the court is aware that in actuality the dairy industry as a whole may suffer in the absence of a stay. The abrupt elimination of a large number of the Class I differentials could significantly disrupt stable market conditions and seriously jeopardize the capability of a large number of dairy farmers to remain in business. As point out by the Secretary, the total loss to dairy farmers in the affected marketing

orders could reach $679 million. Declaration of Richard M. McKee at ¶5. The possibility also exists that the supply of milk in several areas of the country could be disrupted, to the detriment of consumers. The court is not about to let a previously highly-regulated industry slip into chaos due to the abrupt injunction against the differentials.

The court therefore finds that not only could the Secretary's ability to carry out his statutory mandate be irreparably harmed absent a stay, but dairy farmers and ultimately consumers, those whom the Secretary is charged with protecting, may also be harmed by the unstable market conditions that could ensure if a stay is not granted.

3. Injury to Plaintiffs

The court must next consider whether issuance of a limited stay will substantially injure the non-moving party. If such a stay is granted, plaintiffs will continue to receive payments pursuant to the established differentials, just as they have for many years. The court recognized that these payments may not be as high as plaintiffs may wish, but it is undeniable that such payments are actually a benefit that will be taken away absent a stay maintaining the status quo and preserving the now-extant price. One long-run implication of the court's injunction may be increased demand for Minnesota Milk with concomitant higher prices to Minnesota farmers. While a limited stay may not be the fastest route to this benefit plaintiffs seek, neither is this result seriously harmful to their interests.

4. Public Interest

For the same reasons the court found that in the absence of a limited stay irreparable harm may come to defendant and the dairy industry, the court finds that a limited stay is in the public interest. Despite the fact that the Secretary has not fulfilled his statutory duty concerning the factors contained in 7 U.S.C. §608c(18), an abrupt change in market conditions with a concomitant loss of income to a large number of America's dairy farmers is not in the public interest. A stay in this action pending appeal is therefore appropriate pursuant

to Fed. R. Civ. P. 62(c).

The court believes that a stay of its order is appropriate only until February 15, 1998. This stay will allow an expedited appeal to go forward, allow the collection and distribution of November 1997, December 1997, and January 1998 milk proceeds based upon the Class I differentials in effect at those times, and not unduly further delay the proceedings. This time will ameliorate any sudden impact of the injunction on the dairy industry and provide for an easier transition to any new differentials promulgated by the Secretary. Such a limited stay will also prevent the indefinite use of the unlawful differentials. It was in this same vein that the court entered its November 7, 1997 order allowing the Secretary to complete the collection and distribution of October 1997 milk proceeds based upon the Class I differentials then in effect. By granting such a limited stay, the court encourages the parties to request an expedited appeal from the Eighth Circuit Court of Appeals so this matter can be set to rest with minimal disruption to all those effected. Any further stays can be requested from the appellate court.

B. Motions to Intervene

Also before the court are motions to intervene. The Association of Dairy Cooperatives in the Northeast, National Farmers Organization, Inc., Milk Industry Foundation, Southeast Dairy Farmers Association and United Dairymen of Arizona, the Texas Association of Dairymen, Dairy Producers of New Mexico, Lone Star Milk Producers, L.C., and premier Milk Producers, Inc., and the state movants all claim intervention as of right pursuant to Fed. R. Civ. P. 24(a). In addition, the National Farmers Organization, Inc., Milk Industry Foundation, and the Association of Dairy Cooperatives in the Northeast seek permissive intervention pursuant to Fed. R. Civ. P. 24(b). For the reasons stated below, all of these motions are denied.

Fed. R. Civ. P. 24(a) governs intervention as of right and provides that

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

As the Eighth Circuit has noted, this rule requires that one seeking intervention must file a timely application and have a recognized interest in the subject matter of the litigation that might be impaired by the disposition of the litigation and that is not adequately protected by existing parties. See Mausolf v. Babbitt, 85 F.3d 1295, 1299 (8th Cir. 1996); Mille Lacs Band of Chippewa Indians v. State of Minn., 989 F.2d 994, 997 (8th Cir. 1993) (citing Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action, 558 F.2d 861, 869 (8th Cir. 1977)). Because the court concludes that all of the motions to intervene are untimely, the court need not consider the other prerequisites to intervention.

Timeliness is determined by considering all the circumstances of the case, and no ironclad rules govern this determination. U.S. v. Union Elec. Co., 64 F.3d 1152, 1158-59 (8th Cir. 1995); Mille Lacs Band, 989 F. 2d at 998. Factors the court should consider include the reason for the proposed intervenor's delay in seeking intervention, how far the litigation has progressed before the motion to intervene is filed; and how much prejudice delayed intervention would cause to parties already part of the action. Arrow v. Gambler's Supply, Inc., 55 F.3d 407, 409 (8th Cir. 1995); Mille Lacs Band, 989 F.2d at 998. If a motion to intervene is not timely, the movant is barred from intervening. Union Electric, 64 F.3d at 1159; Arrow, 55 F.3d at 409. The determination of timeliness is committed to the discretion of the district court. Arkansas Elec. Energy Consumers v. Middle South Energy, Inc., 772 F.2d 401, 403 (8th Cir. 1985) (citing NAACP v. New York, 413 U.S. 345, 365-66 (1973)).

As an initial matter, the court notes that this suit commenced in early 1990. Since that time, not only this court on three occasions but also the Eighth Circuit Court of Appeals have considered the merits of this case. Yet, as plaintiffs point out, despite the eight year history of this case, only after this court's November 3, 1997 injunction did any of the movants seek to intervene.

The movants' rationale for failing to intervene earlier in this case centers on their lack of notice of this action and their failure to realize the effect this suit could have on their interests. The court, quite frankly, finds this proffered explanation hard to believe. On August 17, 1994, and September 10, 1996, the Secretary issued amplified decisions in response to this court's remand orders. Each of these amplified decisions was published in the Federal Register, and each referred specifically to the lawsuit pending in this court. The second amplified decision even contained a detailed procedural history of this case. All of the movants here are organizational entities committed to furthering the interests of their respective dairy clientele. It is hard to fathom that such entities were not aware of any of the Department of Agriculture's publications and activities in this matter.[5]

The movants also cannot claim that they could not foresee this court's injunction against the relevant Class I differentials. The Eighth Circuit determined in 1992 that "[d]eclaring the old orders unlawful and enjoining their enforcement would . . . redress the producers' injury." Minnesota Milk Producers Ass'n v. Madigan, 956 F.2d 816, 819 (8th Cir. 1992). At that time, at the latest, movants should have foreseen that an injunction against the differentials was an option available to the court if such differentials were found to be

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5 The court also notes 44 U.S.C. §1507, which provides that "[F]iling of a document [in the Federal Register] is sufficient to give notice of the contents of the document to a person subject to or affected by it." Under this provision, notice of this suit and its implications should have become known to movants in August 1994, at the latest.

illegal. The court therefore finds no legitimate reason why the movants have not intervened sooner in this action.

A second factor leading to the court's finding of untimeliness is the current posture of this case. The motions to intervene were made only after the court issued a final judgment enjoining certain Class I differentials. No motions to intervene were made when the court on two prior occasions remanded this matter to the Secretary, and only one movant, the Association of Dairy Cooperatives in the Northeast, filed an amicus curie brief. Allowing additional parties to intervene at this late stage of the litigation risks delays on appeal, an important consideration given this court's limited stay and encouragement of an expedited appeal.

Finally, the court concludes that plaintiffs will be prejudiced if intervention is allowed at this state. As plaintiffs point out, the movants late entry into this action would force plaintiffs to respond to many meritless arguments due to the movants' misunderstanding of either the remedy sought by plaintiffs, the Secretary's powers and obligations under the Agricultural Marketing Agreement Act, or the courts' prior and current rulings in this case. If the movants had sought to intervene earlier, rather than simply file amicus briefs or take no action at all, no such prejudice to plaintiffs would exist.

The National Farmers Organization, Milk Industry Foundation, and the Association of Dairy Cooperatives in the Northeast also seek permissive intervention pursuant to Fed. R. Civ. P. 24(b). This provision, however, also requires that application to intervene be timely. For the same reasons as intervention as of right, therefore, these motions are also denied.

C. Motion for Relief from Judgment

The state movants have also made a motion for relief from judgment pursuant to Fed. R. Civ. P.60(b), claiming that the judgment is void because the states were indispensable parties that could have been joined but were not. The court, however, agrees with the

plaintiffs that the states are not indispensable parties. The issue before this court was whether the Secretary's decision to maintain the Class I differentials was legal under the Agricultural Marketing Agreement Act. The states are simply not necessary parties to this action. See NAACP v. Donovan, 558 F. Supp. 218, 223 (D.D.C. 1982) ("This suit requires determination of one basic issue--whether the [Department of Labor] is complying with its own regulations. Clearly the ruling of the court will effect all those people who are affected by the regulations at issue. But this fact does not make all of those effected individuals indispensable parties.").

D. Motion to Stay Pending Hearing

The state movants' motion for stay requested that a stay be issued until a hearing on this matter could be held. This motion is now moot, and will be denied as such.

CONCLUSION

Based on a review of the file, record, and proceedings herein, the court concludes that a limited stay of its November 3, 1997, injunction is appropriate. The court also concludes that intervention by the moving parties is precluded by the untimeliness of their motions, and that the state movants are not entitled to relief from judgment. Therefore, **IT IS HEREBY ORDERED** that:

1. The motion of the state movants to amend previously-filed documents to add additional state parties as potential intervenors and to file supplemental affidavits is granted;

2. The motion of the defendant Secretary of Agriculture to stay this court's November 3, 1997, order is granted. The stay is effective until February 15, 1998, so as to allow an expedited appeal and the collection and distribution of November 1997, December 1997, and January 1998 milk proceeds based upon the Class I differentials in effect at those times;

3. The motions of the Association of Dairy Cooperatives in the Northeast, National Farmers Organization, Inc., Milk Industry Foundation, Southeast Dairy Farmers Association and United Dairymen of Arizona, the Texas Association of Dairymen, Dairy Producers of New Mexico, Lone Star Milk producers, L.C., and Premier Milk Producers, Inc., and the Louisiana Department of Agriculture and Forestry, the Georgia Department of Agriculture, the South Carolina Department of Agriculture, the North Caroline Department of Agriculture, the State of Vermont, the Alabama Department of Agriculture and Industries, the Arkansas Livestock and Poultry Commission, the Washington Department of Agriculture, the Colorado Department of Agriculture, the Maine Department of Agriculture, Food and Rural Resources, the Massachusetts Department of Food and Agriculture, the Mississippi Department of Agriculture and Commerce, the New Hampshire Department of Agriculture, Markets, and Food, the New Mexico Department of Agriculture, and the North Carolina Department of Agriculture to intervene are denied;

4. The motion of the Louisiana Department of Agriculture and Forestry, the Georgia Department of Agriculture, the South Carolina Department of Agriculture, the North Carolina Department of Agriculture, the State of Vermont, the Alabama Department of Agriculture and Industries, the Arkansas Livestock and Poultry Commission, the Washington Department of Agriculture, the Colorado Department of Agriculture, the Maine Department of Agriculture, Food and Rural Resources, the Massachusetts Department of Food and Agriculture, the Mississippi Department of Agriculture and Commerce, the New Hampshire Department of Agriculture, Markets, and Food, the New Mexico Department of Agriculture, and the North Caroline Department of Agriculture for relief from judgment pursuant to Fed. R. Civ. P. 60(b) is denied;

5. The motion of the Louisiana Department of Agriculture and Forestry, the Georgia Department of Agriculture, the South Carolina Department of Agriculture, the North Carolina Department of Agriculture, the State of Vermont, the Alabama Department of

Agriculture and Industries, the Arkansas Livestock and Poultry Commission, the Washington Department of Agriculture, the Colorado Department of Agriculture, the Maine Department of Agriculture, food and Rural Resources, the Massachusetts Department of Food and Agriculture, the Mississippi Department of Agriculture and Commerce, the New Hampshire Department of Agriculture, Markets, and Food, the New Mexico Department of Agriculture, and the North Carolina Department of Agriculture to stay pending a hearing is denied as moot.

Dated: December 5, 1997

/s/ David S. Doty
David S. Doty, Judge
United States District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil No. 4-90-31 (DSD/JMM)

Minnesota Milk Producers, et al.,

Plaintiffs,

v. **ORDER**

Dan Glickman, Secretary, United States Department of Agriculture

Defendant.

Lynn A. Hayes,, Esq., Patricia A. Jensen, Esq.,, Eric N. Olsen, Esq. and Farmers Legal Action Group, 1301 Main Building, 46 East Fourth Street, St. Paul, MN 55101 and James T. Massey, Esq., Farmers Legal Action Group, Inc., 360 S. W. Cascade Street, P.O. Box 1689, Sisters, OR 97759, counsel for plaintiffs.

Mary Jean Atmore, Assistant U.S. Attorney and Robert M. Small, Assistant U.S. Attorney, 600 U.S. Courthouse, 300 South Fourth Street South, Minneapolis, MN 55415 and Herbert E. Forrest, Room 3326, U.S. Department of Justice, Civil Division, 10th & Pennsylvania Avenue N. W., Washington, D.C. 20004, counsel for defendants.

This matter is before the court on plaintiffs' motion for summary judgment. Based on a review of the file, record, and proceedings herein, the court grants plaintiffs' motion with regard to the Class I differentials in the 28 surplus and balanced market marketing orders

and any deficit order that does not rely directly or indirectly on alternative supplies from the Upper Midwest orders.

BACKGROUND

This case has a lengthy procedural history. Currently before the court is plaintiffs' fourth motion for summary judgment. On two prior occasions this case has come before judges of this court, and on both occasions proposed amendments to the Class I pricing scheme of the federal milk marketing orders promulgated by the Secretary of Agriculture (hereafter "Secretary") under the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c(1) et seq., (hereafter the "Act") have been found arbitrary and capricious. On each occasion the court found that the Secretary had failed to consider the statutory factors required by § 608c(18) of the Act and remanded for further consideration. In its two prior orders in this case, the court has attempted to explain the different components making up the price of milk and how that price is determined. To the extent relevant here, the court refers to the discussion in those orders.

The court's first order concerning the final decision of the Secretary was issued on April 14, 1994. In evaluating the Secretary's final decision, the court held that

> [t]he Secretary's decision to retain the existing Class I pricing structure is tantamount to a finding that it continues to satisfy the requirements of the AMAA as set out in § 608c(18). This conclusion may or may not be supported by substantial evidence from the administrative hearing, but since explicit findings and explanations were not issued relative to the 608c(18) factors, the court is unable to make that determination.

Order of April 14, 1994 (Docket No. 122) at 19. In finding the Secretary's decision to be arbitrary and capricious, the court remanded the final decision to the Secretary for 123 days, during which time the Secretary was ordered to conduct any necessary hearings or other

proceedings and then issue an amplified decision articulating the statutory bases of his decision to retain Class I differentials in the federal milk pricing program. In response, the Secretary issued his first amplified decision on August 17, 1994, in which he attempted to respond to the court's concerns and provide further explanation of why he did not change the Class I pricing structure and how this decision complied with § 606c(18).

Plaintiffs, however, again challenged the Secretary's decision, and faced again with the question of whether the Secretary had adequately considered the requisite factors, the court on May 16, 1996, again found that he had not done so. Specifically, the court determined that "[a]lthough the differentials are not intended to fully cover transportation costs, there is one irreducible fact implicit in the Secretary's analysis: a point of origin." Order of May 17, 1996 (Docket No. 147) at 6. The court held that the Secretary may not enforce such a single basing-point system without explaining "how it reflects full and reasoned consideration of the statutory factors." Id. at 7. The court remanded this matter a second time to the Secretary so he could, rather than simply restating his decision to retain the differentials, "make such findings and conclusion as reflect reasoned consideration of the § 608c(18) factors." Id. at 9. The court also remanded the case because the Secretary had not complied with the court's initial order that the Secretary consider the relevant factors with respect to the use of M-W price. On remand, the court specifically asked the Secretary to: (1) make such findings and conclusion as reflect reasoned consideration of the § 808c(18) factors concerning the decision to retain the Class I differentials, and (2) explain how the § 608c(18) factors relate to the actual price received as the M-W price and how the M-W price reflects market-specific economic conditions.

The Secretary's second amplified decision was issued on September 10, 1996, and on March 3, 1997, plaintiffs brought this, their fourth motion for summary judgment. Plaintiffs again challenge various aspects of the federal milk pricing program and argue that the three decisions of the Secretary are arbitrary and capricious and not

supported by record evidence.

DISCUSSION

The court, in its two prior orders in this case, set out the standard for reviewing the Secretary's decisions. To repeat, review of an agency's construction of a statute requires a two-part analysis. If Congress has spoken to the precise issue, its intent must be given effect. Chevron, USA v. Nat'l Resources Council, Inc., 467 U.S. 837, 842-43 (1984); Sierra Club v. Davies, 955 F.2d 1188, 1193 (8th Cir 1992). If Congress has not spoken directly to the issue, the question is whether the agency's construction is permissible. Id.

As the court has already determined on two prior occasions, Congress has spoken to the precise issue in this case. In 7 U.S.C. § 608c(18), Congress provided that when the Secretary establishes a pricing system, such prices

> shall...be adjusted to reflect the price of feeds, the available supply of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that parity prices of such commodities are not reasonable in view of the price of feeds, the available supply of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest.

7 U.S.C. § 606c(18). While the Act mandates that each milk marketing order's price reflect economic conditions affecting supply and demand in that particular marketing order, the court previously found that no record evidence was presented by the Secretary in his final or first amplified decisions to show that he had considered the requisite statutory factors of § 608c(18) in promulgating the Class I prices.

In determining whether an agency decision is arbitrary and capricious, "the reviewing court must determine whether the decision was based on the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). The scope of review is a narrow one and the court should not substitute its judgment for that of the agency. Motor Vehicle Mfgs. Ass'n v. State Farm Mutual, 463 U.S. 29, 43 (1983). As stated previously,

> Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, failed to consider an important aspect of the problem, offered an explanation for its decision which runs contrary to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise.

Id.

1. The Class I Differentials

Plaintiffs contend that the Secretary's second amplified decision is still deficient with regard to the Class I differentials. They argue that while the court in its second remand order directed the Secretary to make specific findings and conclusions that demonstrate reasoned consideration of all the pricing factors mandated by the Act, the secretary has failed to do so. Instead of providing administrative record evidence to demonstrate why distance from Eau Clair, Wisconsin, is a relevant consideration in setting the level of each

marketing order's Class I differential, plaintiffs argue the Secretary merely rephrases propositions the court used as the basis for its find of a single-basing point. Pls.' Mot. for Summ. J. After Second Remand Order (Docket No. 153) at 8 (hereafter "Plaintiffs' Memo,"). Plaintiffs also contend that the Secretary's findings with regard to the twenty-eight surplus or balanced marketing orders[2] belie any rational connection between the supply and demand conditions of these orders' markets and the Secretary's explanation for the level of their Class I differentials. Plaintiffs argue that the Secretary's explanation that the Class I differentials reflect the cost of transporting milk does not support the level of differential in these markets in light of local supply and demand conditions.

([2] Of the forty marketing orders analyzed in the final administrative decision, twenty-one were found to be balanced markets and seven were found to carry surplus milk supplies. A balanced market is one with sufficient milk to meet demand plus a 40% reserve. A surplus market produces milk in excess of the demand and reserve percentage. conducted further proceedings to build such a record.)

Defendant responds by pointing out that the differentials deal only with the transportation costs of milk. The M-W, on the other hand, deals with the many supply and demand factors referenced in § 608c(18). Because the rulemaking at issue here dealt only with the differentials, the § 608c(18) factors were not considered and there is no record to which the Secretary can point.

After reviewing the second amplified decision, the court comes to the conclusion that the Secretary again has failed to fulfill his statutory mandate. Much of the Secretary's latest effort is dedicated to a review of the historical development of the classified pricing system, the realities of the dairy industry as it relates to the marketing of milk, the precise nature of the rulemaking underlying this litigation, and the current status of the classified pricing system. While this proves useful as background information, it does nothing to satisfy the court that the Secretary has considered the § 608c(18) factors in setting the Class I differentials.

The Secretary's response to the court's request that he make such findings and conclusions as reflect reasoned consideration of the § 608c(18) factors concerning the decision to retain the Class I differentials is inadequate. The Secretary's efforts are spent trying to debunk the court's conclusion that a single-basing point system is being used. While the Secretary goes to great lengths to show that distance from Eau Claire is not a priority in setting the Class I differentials, and that in fact a South-North "ripple effect" is at work, nowhere in the second amplified decision does the Secretary point to record evidence that supports his consideration of the relevant factors. As plaintiff points out, the Secretary "does not mention the actual level of a single order's Class I differential, much less show how a specific differential is in any way related to the local market's need to attract Class I milk." Plaintiffs' Memo. at 7. Even if the Secretary has shown that no single basing point is being used, he still has not justified, using record evidence, the "ripple effect" leading to the Upper Midwest.

This lack of evidence convinces the court that the Secretary is either unwilling to explain why the Class I differentials are set at their current level or is unable to do so with record evidence. Whichever is the case, the Secretary's conclusory statements explaining why the marketing orders' Class I differentials are set at their current levels is insufficient. No record evidence has been provided demonstrating that these differentials are set at levels reflecting the supply and demand conditions and other required considerations in each order. If, as the Secretary contends, no record evidence is available because the Rulemaking at issue did not consider the factors, then the Secretary should have conducted further proceedings to build such a record.

The court is especially wary of the Secretary's explanation for the level of Class I differentials in the twenty-eight balanced and surplus orders. In these orders, the Secretary has found that sufficient milk supplies exist to meet the demand for milk within that order and to cover all shipments out of the order to meet Class I demands in other order areas. Yet, the Secretary contends that these orders' Class I differentials are set to attract supplies from the Upper Midwest to

either meet Class I demand in that order or replace milk shipped out of the order to meet the demand for Class I milk in other orders. If the order is a balanced or surplus market, however, by the Secretary's own definition no alternative supplies are required. Therefore, the Secretary's explanation for the Class I differentials in the balanced and surplus orders does not reflect his findings regarding supply and demand conditions there. This is in violation of § 608c(18), which, as already discussed, dictates that the price of milk be set to reflect local supply and demand conditions.

Because the differentials go against the express intent of Congress, as codified in § 608c(18), that the price of milk reflect market-specific supply and demand conditions in each order, the court will not defer to the agency in this case.

2. The M-W Price

In its second remand order, the court explicitly directed the Secretary to explain how the § 608c(18) factors relate to the actual price received as the M-W price and how the M-W price reflects market-specific economic decisions. In that order, the court stated that "it is clear that the Secretary simply assumes that the M-W price 'captures' [the price and supply of feeds and other factors] without providing any evidence that this actually is the case." Order of May 17, 1996 at 6. In the second amplified decision, the Secretary responds by pointing to the national hearing held in 1992 to address the M-W price. At this separate hearing, the Department of Agriculture addressed the M-W price and ten different proposals for change in light of the supply and demand factors contained in § 608c(18). In evaluating the proposals submitted as part of this proceeding, the Secretary indicated that any proposal to change the M-W would have to be justified under the § 608c(18) factors. As a result of this hearing, the Secretary has determined that a modified M-W price, now referred to as the Basic Formula Price ("BFP"), satisfies the statutory pricing criteria of the Act.

The court finds that the Secretary's reference to the second

administrative hearing, as discussed in the second amplified decision, deals with the § 608c(18) factors and the M-W price. Accordingly, the court finds that the Secretary has fulfilled his burden with respect to this aspect of the Class I price of milk. In so holding, the court notes that the M-W has never been the focus of plaintiffs' challenge and that plaintiffs do not seek any form of injunctive relief related to the M-W. Indeed, even in arguing against the M-W, plaintiffs return to their argument that excessively high Class I differentials are dictating supply. See Plaintiffs' Memo. At 21.

While the court recognizes that the issues of relevance here may become moot after the Secretary promulgates his new milk marketing order plan pursuant to the 1996 Farm Bill, such possibility does not justify further delay by this court. The Secretary has done nothing more than provide a series of conclusory statements explaining the levels of the marketing orders' Class I differentials. No record evidence has been provided to demonstrate compliance with the § 608c(18) requirement that the differentials reflect each order's specific supply and demand conditions, and the levels set in the twenty-eight balanced and surplus orders appear to be in conflict with the Secretary's own evidentiary findings. The second amplified decision is therefore found arbitrary and capricious and further consideration by the Agency is again required. The court, however, concludes that no purpose will be served in remanding this case yet again to the Secretary to give him a third opportunity to explain his decision. The Secretary seems either unwilling or unable to comply with this court's remand orders, and the court will not delay action yet again.

CONCLUSION

Based on a review of the file, record and proceedings herein, the court concludes that plaintiffs are entitled to summary judgment with regard to the Class I differentials in the 2% surplus and balanced milk marketing orders and any deficit order that does not rely directly or indirectly on alternative supplies from the Upper Midwest orders. Therefore, IT IS HEREBY ORDERED that:

1. The Class I differentials in all surplus and balanced marketing orders and all deficit orders that do not rely on direct shipments of alternative milk supplies from the Upper Midwest or from other deficit orders which in turn rely on the Upper Midwest for replacement supplies are unlawful due to the Secretary's failure to consider the factors mandated by the Agricultural Marketing Agreement Act, codified at 7 U.S.C § 608c(18);

2. The Secretary is enjoined from enforcing these differentials;

3. The final, first amplified and second amplified decisions regarding Class I differentials are found to be arbitrary and capricious because they are not supported by substantial evidence in the record and do not describe findings regarding all of the § 608c(18) factors.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: November 3, 1997

David S. Doty, Judge
United States District Court

MINNESOTA MILK PRODUCERS ASSOCIATION, a non-profit Minnesota corporation; Bill Dropik; Chester Kolstad; Greg Radermacher; Arnold Ness; Fredrick J. Bianchi; Marlon Restad; Delbert Mandelko; John Fischer; Lee Johnston; Leslie Kyllo; and James Muzzy,
Appellants,

v.

Edward MADIGAN, Secretary, United States Department of Agriculture,
Appellee

No. 91-1594.
United States Court of Appeals,
Eighth Circuit.
Submitted Nov. 11, 1991.
Decided Feb. 11, 1992.

Milk producers brought suit seeking to have enjoined and declared invalid certain provisions of milk-marketing orders issued by the Secretary of Agriculture. Suit was dismissed by the United States District Court for the District of Minnesota, Diana E. Murphy, J., and producers appealed. The Court of Appeals, Arnold, Circuit Judge, held that: (1) the Agricultural Marketing Agreement Act of 1937 did not impliedly preclude judicial review in suit brought by producers, and (2) producers had standing.

Reversed and remanded.

Stuart, Senior District Judge, sitting by designation, filed a dissenting opinion.

James T. Massey, Sisters, Or., argued (Lynn A. Hayes, St. Paul, Minn., on brief), for appellants.

Herbert E. Forrest, Washington D.C., argued (Anthony J. Steinmeyer, Washington, D.C., on brief), for appellee.

Before LAY, (FN*) Chief Judge, ARNOLD, (FN**) Circuit Judge, and STUART, (FN***) Senior District Judge.

ARNOLD, Circuit Judge.

The Minnesota Milk Producers Association and its directors (the producers) appeal from the District Court's dismissal of their suit seeking to have certain provisions of milk-marketing orders issued by the Secretary of Agriculture enjoined and declared invalid under the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. ss 601 et seq. We reverse and remand.

*817 On January 17, 1990, the producers filed this action under the Administrative Procedure Act, 5 U.S.C. ss 701 et seq., challenging certain provisions of milk-marketing orders covering marketing areas east of the Rocky Mountains. The producers claimed that since these orders were originally promulgated, changed conditions have rendered their current enforcement by the Secretary unlawful under the AMAA. In general, the producers argued that the pricing structure for milk set by the Secretary's orders stimulates an oversupply of milk, which, in turn, causes a decline in the price they receive for their milk. This decline, they concluded, is in violation of the Secretary's obligation to maintain orderly market conditions for the producers under the AMAA. In order to remedy these perceived violations, the producers sought, among other things, an injunction compelling the Secretary to terminate or suspend certain unlawful orders as contrary to the AMAA and a declaration that the orders violate the AMAA.

The District Court dismissed the producers' suit. It held that the AMAA precluded judicial review of their claims. Although this ruling disposed of the producers' claims, the Court went on to state that the producers most likely lacked standing under Article III to bring their claims because the relief they sought would not redress the injury they claimed. From these rulings, the producers appeal. (FN1)

[1] The Administrative Procedure Act authorizes suits by parties "adversely affected or aggrieved by agency action within the meaning of a relevant statute...." 5 U.S.C. s 702. This authorization is withheld, however, when the relevant statute "[p]recludes judicial review." Id. at s 701(a)(1). There is no claim that the AMAA precludes all judicial review of challenges to milk-marketing orders. Indeed, 7 U.S.C. s 608c(15) explicitly provides a cause of action to milk handlers to challenge orders when they have exhausted administrative remedies. Nor is there a claim that the AMAA explicitly precludes review of the producers' claims. The issue, then, is whether the AMAA impliedly precludes judicial review of milk producers' claims of the kind made in this case. We conclude that it does not.

At the heart of this dispute lies the Supreme Court's decision in Block v. Community Nutrition Institute, 467 U.S. 340, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). After examining the over-all structure of the AMAA, the Court held that the Act impliedly precluded judicial review of milk consumers' challenges to milk-marketing orders. The Court noted that the AMAA allows only producers and handlers to participate in the administrative proceedings to adopt milk-marketing orders, not consumers. This structure, the Court continued, "indicates that Congress intended only producers and handlers, and not consumers, to ensure that
the statutory objectives would be realized." Id. at 347, 104 S.Ct. at 2454. Another fact the court found relevant was that only handlers--the sole group provided with an express cause of action under the Act--had administrative remedies available to them under the AMAA. This analysis led the Court to conclude that "Congress intended that judicial review of market orders issued under the Act ordinarily be confined to suits brought by handlers in accordance with 7 U.S.C. s 608c(15)." Id. at 348, 104 S.Ct. at 2455 (emphasis ours).

In reaching its conclusion that the AMAA impliedly precluded judicial review of consumers' claims, the Court distinguished its holding in Stark v. Wickard, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944). In Stark, the Court held that the AMAA did not impliedly

preclude judicial review of producer challenges to the administration of market-order-settlement funds. In order to distinguish Stark, the Community Nutrition Court focused on *818 the difference between consumers and producers under the Act. The Court noted that in Stark the producers alleged injury to their " 'definite personal rights 'that were' not possessed by the people generally' " which "gave [them] standing to object to the administration of the settlement fund." 467 U.S. at 351, 104 S.Ct. at 2456 (quoting Stark). Moreover, the Community Nutrition Court emphasized that one of the Act's fundamental objectives is to protect the producers of milk, not the general public. Id. at 352, 104 S.Ct. at 2457. Thus, it made sense to allow producers in Stark to challenge administration of the settlement fund which was established for their benefit.

The Secretary relies on the Ninth Circuit's decision in Pescosolido v. Block, 765 F.2d 827 (9th Cir.1985), to argue that Stark and Community Nutrition stand for the proposition that producers have a cause of action under the Act only when there is no handler of milk products to protest the Secretary's action. Since handlers could challenge the Secretary's orders at issue here, the argument goes, handlers alone have access to judicial review of these orders.

With all respect to the Pescosolido Court, we disagree. It is true that in Community Nutrition the Court noted the fact that in Stark handlers did not have an interest in the administration of the settlement fund. Community Nutrition, 467 U.S. at 351-52, 104 S.Ct. at 2456-57. As the Community Nutrition Court indicated, if the Court had not allowed the producers to sue in Stark, then there would have been "no forum"--either administrative nor judicial--in which the Secretary's actions could have been challenged. Id. at 352, 104 S.Ct. at 2457 (quoting Stark, 321 U.S. at 309, 64 S.Ct. at 570). Despite this language, we believe Pescosolido read Community Nutrition and Stark too narrowly. The Community Nutrition Court emphasized that an examination of the over-all structure of the Act is necessary to determine if judicial review is precluded. Thus, even if handlers have the ability to challenge a particular action by the Secretary (a fact we are willing to assume here), that fact is not necessarily dispositive of

whether producers' claims are subject to judicial review.

Other considerations present here point in favor of judicial review: the fact that handlers in this case have no reason to challenge the Secretary's orders; that the producers are asserting a "definite personal right[ ]" of the kind identified in Stark; (FN2) and that the producers here do not have authority under the Act, 7 U.S.C. s 608c(16), to vote for repeal of the orders they are challenging, because the orders cover production areas in which they are not producers.

We also find the Sixth Circuit's opinion in Farmers Union Milk Marketing Cooperative v. Yeutter, 930 F.2d 466 (6th Cir.1991), persuasive on this point. Farmers Union involved milk producers' challenge to a milk-marketing order the producers claimed reduced the prices they received for their milk, in violation of the Act. In rejecting Pescosolido's analysis and deciding that the claims were judicially reviewable, the Court emphasized that "the purpose of the AMAA is wealth redistribution in favor of milk producers." Id. at 474. In the Sixth Circuit's view, judicial review should be available for a claim that an order issued by the Secretary had the opposite effect, because such review would promote the Act's purpose. Thus, the Community Nutrition Court's concern--that allowing parties to go outside the regulatory scheme would undermine the objectives of the Act by disrupting that scheme--was not implicated by allowing the producers to bring their claims to court. We agree with Farmers Union.

[2] Having concluded that the Act does not preclude judicial review of the producers' claims, we next consider whether they have standing under Article III to bring their claims in federal court. That is, have they alleged an injury that the courts are *819 capable of remedying? We conclude that they have. The producers have alleged that provisions of the Secretary's orders directly cause a reduction in the price they receive for their milk. Construing these allegations in the light most favorable to the producers, as we are required to do, see, e.g., City of St. Louis v. Dep't of Transportation, 936 F.2d 1528, 1532 (8th Cir.1991), we have little trouble concluding that the relief they

seek would redress their injury. The Secretary's emphasis on the ongoing rulemaking proceedings to adopt new milk-marketing orders misses the mark. Until those new orders are adopted and implemented, the old orders presumably will continue to harm the producers. Declaring the old orders unlawful and enjoining their enforcement would therefore redress the producers' injury.

The judgment of the District Court is reversed. The cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

STUART, Senior District Judge, dissenting.

I respectfully dissent.

In my opinion, under the facts and circumstances of this case, judicial review of the Secretary's Marketing Order is precluded. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Block v. Community Nutrition Institute, 467 U.S. 340, 345, 104 S.Ct. 2450, 2453, 81 L.Ed.2d 270 (1984).

The federal milk marketing program was enacted by Congress as part of the Agricultural Marketing Agreement Act of 1937 (AMAA) to establish and maintain orderly marketing conditions for agricultural commodities and to establish parity prices for farmers. "The regulation of agricultural products is a complex, technical undertaking. Congress channelled disputes concerning marketing orders to the Secretary in the first instance because it believed that only he has the expertise necessary to illuminate and resolve questions about them." Community Nutrition, 467 U.S. at 347, 104 S.Ct. at 2454.

The marketing order in question here was effective after the regulatory procedure had been completed. It was approved by

handlers of at least 50% of the volume of milk covered by the order and by at least two-thirds of the dairy producers by number or volume of the affected region which included all states east of the Rocky Mountains.

Plaintiffs state their claim as follows:

The Minnesota milk producers claim that the Secretary has acted and is acting outside the narrowly-enumerated authority granted under the AMAA in two distinct ways. First, the Secretary is maintaining and enforcing the Class I price differential provisions, which cause disorderly marketing conditions by stimulating an over-supply of milk, causing a decrease in the price Minnesota producers receive for their milk. Second, the Secretary is maintaining compensatory payment and down allocation provisions, which constitute economic trade barriers between markets east of the Rockies. These provisions are central to the pricing structure of the marketing orders. Together, these provisions affect both the price producers within a given order's marketing area receive for their milk as well as the prices received by producers in other marketing order areas. The Minnesota producers challenge these provisions in all orders east of the Rockies because of the dramatic impact they have on prices Minnesota producers receive for their milk.

They claim that changing conditions have rendered the milk marketing orders--which were lawful when made--unlawful and in violation of the purpose of AMAA "to ensure that dairy producers throughout the country receive fair prices for the milk and that milk is consistently available to consumers in all areas." Appellant's Brief p. 4.

This claim is far different from the claim made in Stark v. Wickard, 321 U.S. 288, 64 *820. S.Ct. 559, 88 L.Ed. 733 (1944). There, the Secretary's Order directed the administrator to deduct funds coming into his hands from the producer's sale price to make payments to cooperatives. These deductions reduced "the amount actually received by the producers for their milk". Id. at 302, 64 S.Ct. at 567.

As the statute assured producers of minimum prices for their milk such a deduction was a clear violation of the statute. There was no other forum than the courts to hear the producers complaint.

Here, the claim involves judgment as to whether or not the order in question is contrary to the express purposes of the AMAA. Such judgment involves the Secretary's expertise. There will certainly be a difference of opinion between the Minnesota-Wisconsin producers and those in other parts of the country east of the Rockies that are benefitting from the order. Those producers are not parties to this action.

I believe that it is to be implied, from the wording of the statute, the statutory scheme, its objectives, its legislative history and the nature of the administrative action involved, that Congress did not intend to provide for judicial review under these facts.

Additional factors that support my position are:

1. The statute specifically gives handlers the right to judicial review but does not mention producers.

2. 7 U.S.C. s 608c(16)(B) provides an administrative remedy for producers. The Secretary shall terminate any marketing agreement when 50% of the producers producing more than 50% of the volume favor termination.

3. The issue before the court involves a complex regulatory scheme and a discretionary decision by the Secretary whose expertise is important. "A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing." Blair v. Freeman, 370 F.2d 229, 232 (D.C.Cir.1966). It is unlikely that Congress would have intended to imply judicial review of such a complex procedure.

4. Most cases relied upon by the appellants relate to court actions where a new marketing order is involved. This case involves a

question of terminating a validly enacted order.

I prefer the reasoning and analysis in Pescosolido v. Block, 765 F.2d 827 (9th Cir.1985). I would affirm the trial court.

FN* The Honorable Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992, before the opinion was filed.

FN** The Honorable Richard S. Arnold became Chief Judge of the United States Court of Appeals for the Eighth Circuit on January 7, 1992.

FN*** The Honorable William C. Stuart, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

FN1. The District Court made two additional rulings which the producers have not challenged on appeal: it held that the producers' request for an injunction forcing the Secretary to hold hearings to adopt new marketing orders was moot because the Secretary had convened the hearings; and that the producers' request that the Secretary's new orders contain certain provisions did not involve a controversy ripe for judicial review.

FN2. Pescosolido involved a challenge to an order applicable to citrus growers. The Court acknowledged that a claim by milk producers would present a different situation because the AMAA grants milk producers a definite personal right to minimum prices. 765 F.2d at 832.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-4145/4241/4331/4334MNMI

AMENDED ORDER

Minnesota Milk Producers, Assn., et al,	*	
Appellees,	*	Order Denying Petition for
	*	Rehearing and Suggestion
v.	*	for Rehearing En Banc
	*	
Dan Glickman, etc.,	*	
	*	
Appellant.	*	

The suggestions for rehearing en banc are denied. Judge Fagg, Judge Wollman, and Judge Beam would grant the suggestions.

The petition for rehearing by the panel is also denied.

Judge Murphy took no part in the consideration or decision of this order.

November 20, 1998

Order Entered at the Direction of the Court:

S / Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES CODE ANNOTATED
TITLE 7. AGRICULTURE
CHAPTER 26--AGRICULTURAL ADJUSTMENT
SUBCHAPTER III--COMMODITY BENEFITS

Current through P.L. 104-98, approved 1-16-96

Sec. 608c. Orders regulating handling of commodity

(1) Issuance by Secretary; rulemaking in response to recommendations of administrative committees

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof

(except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees, and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin): Provided, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing [FN1] and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and

determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) Milk and its products; terms and conditions of orders

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. Throughout the 2-year period beginning on the effective date of this sentence (and subsequent to such 2-year period unless modified by amendment to the order involved), the minimum aggregate amount of the adjustments, under clauses (1) and (2) of the preceding sentence, to prices for milk of the highest use classification under orders that are in effect under this section on December 23, 1985, shall be as follows:

Marketing Area Subject to Order	Minimum Aggregate Dollar Amount of Such Adjustments Per Hundredweight of Milk Having 3.5 Percent Milkfat
New England	$3.24
New York-New Jersey	3.14
Middle Atlantic	3.03
Georgia	3.08
Alabama-West Florida	3.08
Upper Florida	3.58
Tampa Bay	3.88
Southeastern Florida	4.18
Michigan Upper Peninsula	1.35
Southern Michigan	1.75
Eastern Ohio-Western Pennsylvania	1.95
Ohio Valley	2.04
Indiana	2.00

Chicago Regional 1.40
Central Illinois 1.61 Southern Illinois 1.92
Louisville-Lexington-Evansville 2.11
Upper Midwest 1.20 Eastern South Dakota 1.50 Black Hills, South Dakota 2.05
Iowa 1.55
Nebraska-Western Iowa 1.75 Greater Kansas City 1.92
Tennessee Valley 2.77
Nashville, Tennessee 2.52 Paducah, Kentucky 2.39
Memphis, Tennessee 2.77 Central Arkansas 2.77 Fort Smith, Arkansas 2.77
Southwest Plains 2.77
Texas Panhandle 2.49
Lubbock-Plainview, Texas 2.49
Texas 3.28 Greater Louisiana 3.28 New Orleans-Mississippi 3.85
Eastern Colorado 2.73
Western Colorado 2.00
Southwestern Idaho-Eastern Oregon 1.50 Great Basin 1.90 Lake Mead 1.60
Central Arizona 2.52 Rio Grande Valley 2.35 Puget Sound-Inland 1.85
Oregon-Washington 1.95

Effective at the beginning of such two-year period, the minimum prices for milk of the highest use classification shall be adjusted for the locations at which delivery of such milk is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged

in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, (d) a further adjustment to encourage seasonal adjustments in the production of milk through equitable apportionment of the total value of the milk purchased by any handler, or by all handlers, among producers on the basis of their marketings of milk during a representative period of time, which need not be limited to one year, (e) a provision providing for the accumulation and disbursement of a fund to encourage seasonal adjustments in the production of milk may be included in an order, and (f) a further adjustment, equitably to apportion the total value of milk purchased by any handler or by all handlers among producers on the basis of the milk components contained in their marketings of milk.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be

made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(H) Omitted.

(I) Establishing or providing for the establishment of research and development projects, and advertising (excluding brand advertising), sales promotion, educational, and other programs, designed to improve or promote the domestic marketing and consumption of milk and its products, to be financed by producers in a manner and at a rate specified in the order, on all producer milk under the order. Producer contributions under this subparagraph may be deducted from funds due producers in computing total pool value or otherwise computing total funds due producers and such deductions shall be in addition to the adjustments authorized by paragraph (B) of this subsection.

Provision may be made in the order to exempt, or allow suitable adjustments or credits in connection with, milk on which a mandatory checkoff for advertising or marketing research is required under the authority of any State law. Such funds shall be paid to an agency organized by milk producers and producers' cooperative associations in such form and with such methods of operation as shall be specified in the order. Such agency may expend such funds for any of the purposes authorized by this subparagraph and may designate, employ, and allocate funds to persons and organizations engaged in such programs which meet the standards and qualifications specified in the order. All funds collected under this subparagraph shall be separately accounted for and shall be used only for the purposes for which they were collected. Programs authorized by this subparagraph may be either local or national in scope, or both, as provided in the order, but shall not be international. Order provisions under this subparagraph shall not become effective in any marketing order unless such provisions are approved by producers separately from other order provisions, in the same manner provided for the approval of marketing orders, and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order. Notwithstanding any other provision of this chapter, any producer against whose marketings any assessment is withheld or collected under the authority of this subparagraph, and who is not in favor of supporting the research and promotion programs, as provided for herein, shall have the right to demand and receive a refund of such assessment pursuant to the terms and conditions specified in the order.

(J) Providing for the payment, from the total sums payable by all handlers for milk (irrespective of the use classification of such milk) and before computing uniform prices under paragraph (A) and making adjustments in payments under paragraph (C), to handlers that are cooperative marketing associations described in paragraph (F) and to handlers with respect to which adjustments in payments are made under paragraph (C), for services of marketwide benefit, including but

not limited to--

(i) providing facilities to furnish additional supplies of milk needed by handlers and to handle and dispose of milk supplies in excess of quantities needed by handlers;

(ii) handling on specific days quantities of milk that exceed the quantities needed by handlers; and

(iii) transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.

(K)(i) Notwithstanding any other provision of law, milk produced by dairies--

(I) owned or controlled by foreign persons; and

(II) financed by or with the use of bonds the interest on which is exempt from Federal income tax under section 103 of Title 26;

shall be treated as other-source milk, and shall be allocated as milk received from producer-handlers for the purposes of classifying producer milk, under the milk marketing program established under this chapter. For the purposes of this subparagraph, [FN2] the term "foreign person" has the meaning given such term under section 3508(3) of this title.

(ii) The Secretary of Agriculture shall prescribe regulations to carry out this subparagraph. [FN2]

(iii) This subparagraph [FN2] shall not apply with respect to any dairy that began operation before May 6, 1986.

(L) Providing that adjustments in payments by handlers under paragraph (A) need not be the same as adjustments to producers under paragraph (B) with regard to adjustments authorized by subparagraphs (2) and (3) of paragraph (A) and clauses (b), (c), and (d) of paragraph (B)(ii).

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control

and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products, in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: Provided, however, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: Provided, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocadoes, apples, raisins, walnuts, tomatoes, or Florida grown strawberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: Provided further, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a

production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any

agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: Provided, That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

(8) Orders with marketing agreement

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who,

during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of

advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

(11) Regional application

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity

or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

(12) Approval of cooperative association as approval of producers

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) Retailer and producer exemption

(A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any

producer in his capacity as a producer.

(14) Violation of order; penalty

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less than $50 or more than $5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this subsection for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to subsection (15) of this section. The Secretary may issue an order assessing a civil penalty under this subsection only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A)(i) Except as provided in clause (ii), the Secretary of Agriculture

shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(ii) The Secretary may not terminate any order issued under this section for a commodity for which there is no Federal program established to support the price of such commodity unless the Secretary gives notice of, and a statement of the reasons relied upon by the Secretary for, the proposed termination of such order to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives not later than 60 days before the date such order will be terminated.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: Provided, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) Except as otherwise provided in this subsection with respect to the termination of an order issued under this section, the termination or suspension of any order or amendment thereto or provision thereof,

shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments

The provisions of this section and section 608d of this title applicable to order shall be applicable to amendments to orders: Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to this section, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof: Provided further, That if one-third or more of the producers as defined in a milk order apply in writing for a hearing on a proposed amendment of such order, the Secretary shall call such a hearing if the proposed amendment is one that may legally be made to such order. Subsection (12) of this section shall not be construed to permit any cooperative to act for its members in an application for a hearing under the foregoing proviso and nothing in such proviso shall be construed to preclude the Secretary from calling an amendment hearing as provided in subsection (3) of this section. The Secretary shall not be required to call a hearing on any proposed amendment to an order in response to an application for a hearing on such proposed amendment if the application requesting the hearing is received by the Secretary within ninety days after the date on which the Secretary has announced his decision on a previously proposed amendment to such order and the two proposed amendments are essentially the same.

(18) Milk prices

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its

products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk to meet current needs and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(19) Producer or processor referendum for approving order

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section. For the purpose of ascertaining whether the issuance of an order applicable to pears for canning or freezing is approved or

favored by producers as required under the applicable provisions of this chapter, the Secretary shall conduct a referendum among producers in each State in which pears for canning or freezing are proposed to be included within the provisions of such marketing order and the requirements of approval or favor under any such provisions applicable to pears for canning or freezing shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of 66 2/3 per centum except that in the event that pear producers in any State fail to approve or favor the issuance of any such marketing order, it shall not be made effective in such State.

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§ 1126.70 Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the "producer-settlement fund," into which he shall deposit the payments made by handlers pursuant to §§ 1126.71, 1126.76 and 1126.77 and from which he shall make all payments pursuant to §§ 1126.73 (a) through (f) and 1126.77, except that payments to a cooperative association pursuant to § 1126.73(c) shall be offset by any payments due from such cooperative association pursuant to § 1126.1 that have not been received by the market administrator.

§ 1126.71 Payments to the producer-settlement fund.

(a) Subject to paragraphs (c) and (d) of this section, each handler shall pay to the market administrator on or before the 26th day of each month an amount determined by multiplying the handlers receipts during the first 18 days of such month of producer milk (excluding, in the case of a handler described in § 1126.9(c), producer milk delivered to a pool plant) and milk from a handler described in § 1126.9(c) by the Class III price for the preceding month, less:

(1) Payments made by the handler on or before such date to producers for milk received during the 18-day period; and

(2) Proper deductions authorized in writing by producers from whom the handler received milk. except that the amount deducted for each producer shall not exceed the value (at the Class III price) of the milk received from the producer during the 18-day period.

(b) Subject to paragraphs (c) and (d) of this section, each handler shall pay to the market administrator on or before the 16th day after the end of each month an amount equal to such handler's value of milk for such month determined pursuant to § 1126.60(a), as adjusted by the butterfat differential specified in § 1126.74, and pursuant to § 1126.60(b) through (g), less:

(1) Payments made by the handler pursuant to paragraph (a) of this section for such month;

(2) Payments, other than those specified in § 1126.73(d), that were made by the handler on or before such date to producers for milk received during such month;

(3) Proper deductions for the month that were authorized in writing by producers from whom the handler received milk, except that the amount deducted for each producer shall not exceed the value of the milk received from the producer during the month; and

(4) The value at the weighted average price applicable at the location of the plant from which received of other source milk for which a value was computed pursuant to § 1126.60(f).

(c) The following conditions shall apply with respect to the payments prescribed in paragraphs (a) and (b) of this section:

(1) Payments to the market administrator shall be deemed not to have been made until such payments have been received by the market administrator; and

(2) If the date by which payments must be received by the market administrator falls on a Saturday or Sunday or on any Monday that is a national holiday, payments shall not be due until the next day on which the market administrator's office is open for public business.

(d) Payments due the market administrator from a cooperative association handler may be offset by payments determined by the market administrator to be due the cooperative association pursuant to § 1126.73(c).

(e) On or before the 25th day after the end of the month, each person who operated an other order plant that was regulated during such month under an order providing for individual-handler pooling shall pay to the market administrator an amount computed as follows:

(1) Determine the quantity of reconstituted skim milk in filled milk in route disposition from such plant in the marketing area which was allocated to Class I at such plant. If there is such route disposition from such plant in marketing areas regulated by two or more marketwide pool orders, the reconstituted skim milk allocated to Class I shall be prorated to each order according to such route disposition in each marketing area; and

(2) Compute the value of the reconstituted skim milk assigned in

paragraph (e)(1) of this section to route disposition in this marketing area by multiplying the quantity of such skim milk by the difference between the Class I price under this part that is applicable at the location of the other order plant (but not to be less than the Class III price) and the Class III price.

[40 FR 23438, May 30, 1975, as amended at 44 FR 18939, Mar. 30, 1979]

§ 1126.72 [Reserved]

§ 1138.70 Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the "producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to §§ 1138.71, 1138.76 and 1138.77 and from which he shall make all payments pursuant to §§ 1138.72 and 1138.77, except that payments to a cooperative association pursuant to § 1138.72 shall be offset by any payments due from such cooperative association pursuant to § 1138.71 that have not been received by the market administrator.

§ 1138.71 Payments to the producer-settlement fund.

(a) Subject to paragraph (d) of this section, each handler shall pay to the market administrator on or before the 14th day after the end of the month the amount, if any, by which the amount specified in paragraph (a)(1) of this section exceeds the amount specified in paragraph (a)(2) of this section:

(1) The total value of milk of the handler for such month as determined pursuant to § 1138.60.

(2) The sum of:

(i) The value at the uniform price, as adjusted pursuant to § 1138.75, of such handler's receipts of producer milk and milk received from handlers pursuant to § 1138.9(c). In the case of a cooperative association which is a handler, less the amount due from other handlers pursuant to § 1138.73(d), exclusive of differential butterfat values; and

(ii) The value at the uniform price applicable at the location of the plant from which received of other source milk for which a value is computed pursuant to § 1138.60(f).

(b) Subject to paragraph (d) of this section, each person who operated a plant that was regulated during such month under an order providing for individual-handler pooling shall pay to the market administrator on or before the 25th day after the end of each month an

amount computed as follows:

(1) Determine the quantity of reconstituted skim milk in filled milk in route disposition from such plant in the marketing area which was allocated to Class I at such plant. If there is such route disposition from such plant in marketing areas regulated by two or more marketwide pool orders, the reconstituted skim milk allocated to Class I shall be prorated to each order according to such route disposition in each marketing area; and

(2) Compute the value of the reconstituted skim milk assigned in paragraph (b)(1) of this section to route disposition in this marketing area by multiplying the quantity of such skim milk by the difference between the Class I price under this part that is applicable at the location of the other order plant (but not to be less than the Class III price) and the Class III price.

(c) Any handler who the market administrator determines was more than 3 days late in making any payment obligation under Part 1138 shall pay to the market administrator the amount the handler would have otherwise been required to pay to producers and cooperative associations pursuant to § 1138.73. Payment shall be made to the market administrator on or before the day prior to the dates specified in § 1138.73 and such payments shall continue until the handler has met all payment obligations for 3 consecutive months.

(d) The following conditions shall apply with respect to payments prescribed in paragraphs (a), (b) and (c) of this section:

(1) Payments to the market administrator shall be deemed not to have been made until such payments have been received by the market administrator.

(2) If the date by which payments must be received by the market administrator falls on a Saturday or Sunday or any day that is a national holiday, payment shall not be due until the next day on which the market administrator's office is open for public business.

(3) Payments due the market administrator from a cooperative association handler may be offset by payments determined by the market administrator to be due the cooperative association pursuant to § 1138.73(b) and (d).

§ 1138.72 Payments from the producer-settlement fund.

(a) On or before the 15th day after the end of each month the market administrator shall pay to each handler except one making payment pursuant to § 1138.71(c) the amount, if any, by which the amount computed pursuant to § 1138.71(a)(2) exceeds the amount computed pursuant to § 1138.71(a)(1).

(b) If the market administrator received payment from a handler(s) pursuant to § 1138.71(c), he shall distribute such amount plus any amount due such handler(s) pursuant to paragraph (a) of this section to producers and to cooperative associations in the same manner as provided in § 1138.73. In the event the handler fails to transmit the total amount due, the market administrator shall reduce uniformly the payments due to producers of such handler and complete such payments when the remaining amount is received.

(c) If at any time the balance in the producer-settlement fund is insufficient to make all payments pursuant to paragraph (a) of this section, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the appropriate funds are available.